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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 10

UNITED STATES OF AMERICA, PETITIONER,

vs.

SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 26, 1958

CERTIORARI GRANTED JANUARY 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 540

UNITED STATES OF AMERICA, PETITIONER,

vs.

SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil No. 2364

THE UNITED STATES OF AMERICA, Plaintiff,

v.

SEABOARD AIR LINE RAILROAD COMPANY, Defendant

COMPLAINT—Filed June 4, 1956

1. The United States of America, by Lester S. Parsons, Jr., United States Attorney for the Eastern District of Virginia, brings this action under the Acts of Congress known as the Safety Appliance Acts (U. S. Code, title 45, sections 1 to 16, inclusive), against the Seaboard Air Line Railroad Company, a corporation organized and doing business under the laws of the States of Virginia and North Carolina, and having an office and place of business at Hopewell, Virginia, this action being brought upon suggestion of the Attorney General of the United States, at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

[fol. 3] For a First Cause of Action

2. Plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of Virginia.

3. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-

> braked cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated,

defendant, on March 5, 1956, operated on its line of railroad, over a part of a highway of interstate commerce, one train, to wit: its transfer, consisting of twenty-six cars, drawn by diesel locomotive engine No. 1745, said train being one operated with power or train brakes.

4. That on said date defendant operated said train over its line of railroad from Lead Track at Allied Chemical and Dye Company plant westward to Hopewell Yard, in and about Hopewell, Virginia, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 percent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

5. Defendant is therefore liable to plaintiff in the sum of one hundred dollars.

[fol. 4] For a Second Cause of Action

6. Plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of Virginia.

7. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated,

defendant, on March 5, 1956, operated on its line of railroad, over a part of a highway of interstate commerce, one train, to wit: its transfer, consisting of twenty-eight cars,

drawn by diesel locomotive engine No. 1745, said train being one operated with power or train brakes.

8. That on said date defendant operated said train over its line of railroad from Track No. 5, Hopewell Yard, eastward to Lead Track at Allied Chemical and Dye Company plant, in and about Hopewell, Virginia, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

9. Defendant is therefore liable to plaintiff in the sum of one hundred dollars.

[fol. 5] For a Third Cause of Action

10. Plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of Virginia.

11. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power braked cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated,

defendant, on March 5, 1956, operated on its line of railroad, over a part of a highway of interstate commerce, one train, to wit: its transfer, consisting of twenty-nine cars, drawn by diesel locomotive engine No. 1758, said train being one operated with power or train brakes.

12. That on said date defendant operated said train over its line of railroad from Track No. 38 near Allied Chemical and Dye Company plant westward to Norfolk and Western Interchange track, thence to Hopewell Yard, in and about Hopewell, Virginia, within the jurisdiction of this court, when none of the cars in said train had their brakes used

and operated by the engineer of the locomotive drawing said train, and when less than 85 percent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

13. Defendant is therefore liable to plaintiff in the sum of one hundred dollars.

[fol. 6] For a Fourth Cause of Action

14. Plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of Virginia.

15. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated,

defendant, on March 6, 1956, operated on its line of railroad, over a part of a highway of interstate commerce, one train, to wit: its transfer, consisting of twenty-three cars, drawn by diesel locomotive engine No. 1758, said train being one operated with power or train brakes.

16. That on said date defendant operated said train over its line of railroad from track No. 3, Hopewell yard, eastward to Lead track, Continental Can Company plant, in and about Hopewell, Virginia, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 percent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

17. Defendant is therefore liable to plaintiff in the sum of one hundred dollars.

[fol. 7] 18. Wherefore, plaintiff prays judgment against said defendant in the sum of four hundred dollars and its costs herein expended.

Lester S. Parsons, Jr., United States Attorney.

[fol. 8] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

[Title omitted]

ANSWER—Filed July 2, 1956

(1) Defendant, Seaboard Air Line Railroad Company, admits the allegations contained in paragraphs 1, 2, 6, 10 and 14.

(2) Defendant, Seaboard Air Line Railroad Company, admits that on March 5, 1956, it operated its diesel locomotive engine No. 1745 from the Lead Track at Allied Chemical and Dye Company plant westward to Hopewell Yard in the City of Hopewell, Virginia, with certain railroad cars thereto attached, but denies that said movement was a train movement but rather a switching movement not within the provisions of U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, with respect to power or train brakes.

(3) Defendant, Seaboard Air Line Railroad Company, admits that on March 5, 1956, it operated its diesel locomotive engine No. 1745 from Track No. 5, Hopewell Yard, eastward to Lead Track at Allied Chemical and Dye Com-[fol. 9] pany plant, in the City of Hopewell, Virginia, with certain railroad cars thereto attached, but denies that said movement was a train movement but rather a switching movement not within the provisions of U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, with respect to power or train brakes.

(4) Defendant, Seaboard Air Line Railroad Company, admits that on March 5, 1956, it operated its diesel loco-

motive engine No. 1758 from Track No. 38 near Allied Chemical and Dye Company plant westward to Norfolk and Western Interchange track, thence to Hopewell Yard, in the City of Hopewell, Virginia, with certain railroad cars thereto attached, but denies that said movement was a train movement but rather a switching movement not within the provisions of U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, with respect to power or train brakes.

(5) Defendant, Seaboard Air Line Railroad Company, admits that on March 6, 1956, it operated its diesel locomotive engine No. 1758 from Track No. 3, Hopewell Yard, eastward to Lead Track, Continental Can Company plant, in the City of Hopewell, Virginia, with certain railroad cars thereto attached, but denies that said movement was a train movement but rather a switching movement not within the provisions of U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, with respect to power or train brakes.

(6) This defendant denies that it is liable to the plaintiffs in any amount on account of the alleged actions set forth in the first, second, third and fourth causes of action of [fol. 10] the complaint, and particularly in paragraphs 5, 9, 13, 17 and 18 thereof.

Wherefore, this defendant asks judgment of this Honorable Court in its behalf, with its costs herein expended.

The defendant requests a jury trial of this case.

Seaboard Air Line Railroad Company, a Corporation, by Eppa Hunton, IV, Its Counsel.

Certificate of service (omitted in printing).

[fol. 11] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF VIRGINIA

LETTER—Filed April 4, 1957

April 4, 1957.

Honorable L. S. Parsons, Jr., United States Attorney, Richmond, Virginia.

Eppa Hunton, IV, Esquire, Electric Building, Richmond, Virginia.

GENTLEMEN:

Re: The United States of America v. Seaboard Air Line Railroad Company. Richmond Civil Action No. 2364

Upon consideration of the record, the argument of counsel and the memoranda of arguments and authorities submitted in the above case, I have reached the conclusion that under the facts presented the movements complained of were switching operations rather than train movements and therefore not covered by the Safety Appliance Acts.

I have given consideration to the terms of the statutes and to the case law called to my attention and I am mindful of the purposes and wisdom of the statute involved. I am also conscious of the fact that the safety record of the [fol. 12] defendant and the added cost of operation are not controlling. However they are worthy of consideration along with the other facts.

After considering the cases cited, I find the language used in *United States* v. *C., B. & Q. R. Co., 199 Fed (2d), 223 (9th Cir.)* particularly apt, where the Court said:

> "Neither Congress nor the Interstate Commerce Commission has seen fit to define the meaning of the word "train" as employed in the Act. This perplexing problem unfortunately, so we think, has been left to the courts. After wrestling with it for some fifty years, courts have accomplished little other than to decide on the particular facts of the case whether the movement was that of a train within the meaning of the Act. It is apparent, therefore, that a holding in one case carries

little weight as a rule for decision in another. Even when the facts of the case are disclosed, the question must depend largely upon the opinion or judgment of the court called upon to make the decision. And where the facts bring the case within the twilight zone, as we think they do in the cases before us, the opinion of one judge or court is likely to be as good as that of another."

I am also in accord with the opinion there expressed that there are decided cases which afford support for both of [fols. 13-20] the contentions here made. In this situation each case is controlled by the facts presented.

Considering all the facts, including the number and nature of the grade crossings referred to and the physical aspect of the yard and the operations, I have reached the conclusion stated.

It is suggested that counsel for the respective parties submit proposed findings of fact and conclusions of law in accordance with the views here expressed.

Very truly yours, Sterling Hutcheson, United States District Judge.

[fol. 21] [Fil endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

Civil Action No. 2364

UNITED STATES OF AMERICA, Plaintiff,

v.

SEABOARD AIR LINE RAILROAD COMPANY, Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 28, 1957

The above entitled cause having come on regularly for trial on January 31, 1957, and the Court having duly considered the evidence and the post-trial briefs, now makes the following

Findings of Fact

1. The defendant, Seaboard Air Line Railroad Company, is a common carrier by railroad engaged in interstate commerce within the jurisdiction of this Court and subject to the provisions of the Acts of Congress known as the Safety Appliance Acts (U. S. Code, Title 45, Sections 1 to 16, inclusive), and the order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> "Not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

2. The main line of the defendant runs from Richmond, Virginia, to points in the State of North Carolina, and other [fol. 22] States, from which main line it operates a branch for freight service only from a point in Chesterfield County, Virginia, known as Bellwood, to the City of Hopewell, Virginia.

3. In said City of Hopewell the defendant has established yard limits for the movement of its locomotives, cars and trains, within which yard limits all of the movements complained of and hereinafter described took place. Included within said yard limits are a large number of tracks which taken as a whole are known as its classification or assembly yard to or from which all trains moving beyond the city limits of Hopewell come or go. In said classification yard trains arriving at Hopewell are broken up and the cars composing the same are separated and reassembled according to their consignees and the location of the place at which loaded cars are to be unloaded or empty cars are to be spotted for loading or interchange made with the Norfolk and Western Railroad (N. & W.).

4. Between the classification yard of the defendant and the lead tracks of the Allied Chemical and Dye Company (Allied Chemical) and Continental Can Company (Can Co.), a distance of approximately two miles, all within the Hopewell yard limits of the defendant, there are the fol-

lowing street and railroad crossings in order, commencing at the classification yard: Hopewell Street, Palm Street, N. & W. track, private road, two N. & W. tracks, private road, Randolph Street (Virginia State Route 10), Terminal Street, DuPont (or Hopewell) Street, N. & W. track. The tracks of the N. & W. parallel those of the defendant from the Allied Chemical and Can Co. plants to Palm Street. The only crossings of streets or railroads where the N. & W. does not parallel those of the defendant are those at Hopewell and Palm Streets. Between the two N. & W. tracks and the private road before reaching Randolph Street there is an [fol. 23] interchange track for the interchange of cars between the N. & W. and the defendant. In conducting movements along this track, which is 7 to 8 feet distant from the track of the defendant, the N. & W. does not connect the hoses between the engines and cars. There are nine industrial sidings or spur tracks of the Seaboard branching off the various points from its rails between the classification yard and Allied Chemical and Can Co. Locomotives of the Allied Chemical, the N. & W., and the defendant use the lead track at the Allied plant. Allied Chemical plant locomotives also use a portion of defendant's track a short distance beyond the confines of said plant.

5. The N. & W. tracks crossed at grade are used by that railroad to serve industries only. Fixed signs known as "Stop Boards" are located on the N. & W. tracks and movements thereon are required to come to a stop before crossing the tracks of the defendant. Movements on the tracks of the defendant across those of the N. & W. have the right-of-way.

6. Each street crossing is provided with all warning devices required by law for the protection of travelers on the highway. Randolph Street crossing is protected by manually operated crossing gates operated by a watchman.

7. Traffic over the private crossings is generally light. Traffic over the street crossings varies from moderate to heavy depending on the time of day, the heavy traffic occurring at hours which do not coincide with the usual hour for movements along the tracks here involved, but there are no scheduled movements over these tracks.

8. The Hopewell Fire Department maintains four pieces of fire-fighting equipment and an emergency rescue vehicle at its engine house on Terminal Street within a few hundred

feet of the tracks here involved. There is no evidence that the movements complained of or similar movements have at any time or in any way interfered therewith.

[fol. 24] 9. All movements within the defendant's yard limits at Hopewell, Virginia, are made under the direction of its agent there.

10. On March 5 and 6, 1956, on complaints made by the Brotherhood of Railway Trainmen, two inspectors from the Interstate Commerce Commission observed four movements of cars within the yard limits of Hopewell to or from defendant's classification yard to or from the Allied Chemical and Can Co. plants. Failure to use air brakes on these four movements, which were entirely within the yard limits, is the basis for this action.

11. The first movement observed by the inspectors originated at the Allied Chemical plant on March 5, 1956, at 12:09 p.m. It consisted of 26 cars and traveled to defendant's classification yard, a distance of approximately 11,000 feet, the maximum distance traveled in these movements. Running speed was approximately 10 miles per hour.

12. The second movement originated at defendant's classification yard on March 5, 1956, at 12:37 p.m. It consisted of 28 cars, thirteen ahead of the engine and fifteen behind. It traveled to the Can Co. plants.

13. The third movement originated at the Allied Chemical plant at 3:26 p.m. on March 5, 1956. It proceeded with 29 cars to an interchange with the N. & W., approximately half way between the Allied Chemical plant and defendant's classification yard. At the interchange, the switch engine disconnected the cars from the Allied Chemical plant, coupled on 20 cars at the interchange, and then again coupled on the 28 just uncoupled. It then proceeded to the classification yard.

14. The fourth movement originated at defendant's classification yard at 11:57 a.m. on March 6, 1957. It consisted [fol. 25] of 23 cars, eight ahead of the engine and 15 behind. It proceeded to the Allied Chemical and Can Co. plants.

15. There is no perceptible grade on any of the tracks involved in the four movements plaintiff complains of.

16. The speed limit in the Hopewell yard which embraces all the tracks involved in this action, is fixed by the rules of the defendant at yard speed; that is, the movement must

not be made at such a speed that it cannot be stopped within half the range of vision along the tracks regardless of whether air brakes are used or not.

17. In the 27 years since the line into Hopewell was established, there have been four crossing accidents; two in 1941, one in 1944, and one in 1954. There has never been an injury to an employee on a movement between the classification yard and the industrial plants, spurs and sidings or interchange with the N. & W. in Hopewell.

18. For the defendant to connect the air hoses on movements between its classification yard and Allied Chemical and Can Co. and intermediate spur tracks, sidings and interchange, would result in a delay of approximately forty minutes in each movement and entail an additional annual expense of $30,000 for wages alone, and other expenses.

19. The movements complained of would not have been less hazardous to employees or the public if air brakes had been coupled and used.

20. The movements complained of were shifting movements and not train movements.

Conclusions of Law

1. No absolute standard is available for determining whether a particular movement is a train movement, so that [fol. 26] under applicable Interstate Commerce Commission regulations 85% of the cars must have air brakes capable of being operated by the engineer of the locomotive, or whether it is a shifting movement, in which case it is not necessary that air brakes be functioning on the cars. Instead, each case must be decided on its merits, giving full consideration to the purpose behind the statute and its implementing regulations and all pertinent facts.

2. The evidence shows that the movements in question were shifting movements and not train movements and that there has been no violation of the provisions of U. S. Code, Title 45, Sections 1 to 16, inclusive, as modified by the order of the Interstate Commerce Commission of June 6, 1910.

3. The action will be dismissed with costs to the defendant.

Sterling Hutcheson, U. S. District Judge, June 28, 1957.

[fol. 27] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

LETTER—Filed June 28, 1957

June 28, 1957.

Edwin J. Slipek, Esquire,
Assistant United States Attorney,
Post Office Building,
Richmond, Virginia.
Eppa Hunton, IV, Esquire,
Electric Building,
Richmond, Virginia.

GENTLEMEN:

Re: The United States of America v. Seaboard Air Line Railroad Company, Richmond Civil Action No. 2364

I have examined the proposed findings of fact and conclusions of law submitted by counsel in the above case. It is my conclusion that the findings and conclusions submitted by the defendant correctly set forth the situation, with the following amendments:

1. On page 2, paragraph numbered 4, line 8, following the words "Randolph Street", I have inserted "(Virginia State Route 10)".

2. On page 3, at the conclusion of paragraph numbered 4, I have inserted the following language: "Locomotives of [fol. 28] the Allied Chemical, the N. & W., and the defendant use the lead track at the Allied plant. Allied Chemical plant locomotives also use a portion of defendant's track a short distance beyond the confines of said plant." It will be noted that this language is substantially the same as suggested by counsel for the plaintiff and would appear to be supported by testimony of the witness Roy E. Kean on page 76 of the transcript.

The findings of fact and conclusions of law suggested by defendant, amended as stated, have been filed today.

If counsel are of opinion that any further order is required, I shall be glad to have proposed draft.

Very truly yours, Sterling Hutcheson, United States District Judge.

[fols. 29-35] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil No. 2364

THE UNITED STATES OF AMERICA, Plaintiff,

v.

SEABOARD AIR LINE RAILROAD COMPANY, Defendant

JUDGMENT—July 3, 1957

This action came on to be tried before the Court, and the evidence adduced by the parties having been heard, and the action having been argued by counsel, and the Court having maturely considered the same and having made its findings of fact and conclusions of law, it is hereby

Adjudged, that this action be, and it hereby is, dismissed on the merits and judgment is accordingly entered for the defendant, Seaboard Air Line Railroad Company.

July 3, 1957

Enter: Sterling Hutcheson, United States District Judge.

I ask for this: Eppa Hunton, IV, Counsel for Seaboard Air Line Railroad Company, defendant. Seen objected to: Edwin J. Slipek, Assistant United States Attorney.

[fol. 1] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

[Title omitted]

Transcript of Testimony—January 31, 1957

Before Honorable Sterling Hutcheson, United States District Judge.

APPEARANCES:

Edwin J. Slipek, Esq., Assistant United States Attorney, and Henry L. Hilzinger, Esq., Attorney for the Interstate Commerce Commission, For the Plaintiff.

Messrs. Hunton, Williams, Gay, Moore & Powell, by Eppa Hunton, IV, Esq., For the Defendant.

[fol. 2] STIPULATIONS OF COUNSEL

Mr. Slipek: To expedite the case, counsel for the Government and counsel for defendant have agreed on certain stipulations, which Mr. Hunton will present to the Court.

Mr. Hunton: If Your Honor please, it has been stipulated and agreed between counsel in this matter that the plat which I have here of the City of Hopewell, entitled "Map of Hopewell, Virginia, Office of City Engineer—Scale One Foot Equals 600 Feet—January 1, 1955," may be introduced and considered in evidence as Government's Exhibit 1 as if fully proven; that the plat entitled "Map Showing Curve and Alignment of Prince George & Chesterfield Railway, Bellwood, Virginia, to Hopewell, Virginia—Scale One Inch Equals 1,000 Feet—February 18, 1925, Revised June 25, Office of Chief Construction Engineer, Norfolk, Virginia"; and a third one entitled, "Layout Hopewell, Virginia—Scale One Inch Equals 20 Feet—Part of Chief Engineer's Drawing No. 12031," may be considered as Defendant's Exhibits 1 and 2 respectively.

It is stipulated and agreed between counsel that the movements in question were made without the 85 percent of air brakes connected and operating, as alleged, as well as the [fol. 3] other admissions contained in the answer filed.

CHARLES R. MEYRICK, called as a witness by and on behalf of the plaintiff; and being first duly sworn, testified as follows:

Direct examination.

By Mr. Slipek:

Q. Mr. Meyrick, kindly state your name, residence, and occupation, please, sir.

A. Charles R. Meyrick, Robert Bruce Drive, Bon Air, Virginia; I am an inspector for the Interstate Commerce Commission.

Q. How long have you been so employed, sir?

A. Approximately two and a half years.

Q. What was your occupation prior to becoming an inspector?

A. I was a brakeman and conductor for the Boston & Albany Railroad.

Q. How long were you so employed?

A. Twelve years and two months.

Q. Will you please outline to the Court your duties as a safety inspector?

A. As a safety appliance inspector, I am expected to inspect the installation and maintenance of various types [fol. 4] of safety appliances on railroad locomotives and carriers; to investigate complaints which may have been initiated by the traveling public and employees upon railroads as to unsafe practices, defective safety appliances or things used on train tracks; to investigate accidents in which there is serious or extensive damage to property or loss of life.

Q. What is your area of operations?

A. It comprises nearly the entire State of Virginia, nearly the entire State of West Virginia, the State of Delaware, the District of Columbia, and approximately half of the State of Maryland.

Q. Directing your attention to the dates on or about March 5 and 6, 1956, did you have occasion to conduct an investigation in the Hopewell area and, specifically, did you have occasion to investigate the Seaboard Air Line Railway?

A. Yes, sir, I did.

Q. Will you, then, sir, give the Court in your own words the results and findings of your investigation on those dates?

The Witness: May I refer to notes?

The Court: Yes, sir.

A. On the 5th of March, 1956, I was in the vicinity of Allied Chemical & Dye Company's plant at Hopewell and observed Seaboard Air Line Engine 1745 depart from that [fol. 5] point at 12:09 p. m., with twenty-six cars. I also observed that the air hose between the engine and the first car was not coupled; consequently, the brakes on none of the cars could be operated.

Q. Will you speak so the Court can hear you.

A. I'm sorry. I observed this Seaboard Air Line Engine 1745 depart from this point with twenty-six cars and the air brakes operative on none of these cars. That departed at 12:09 p. m., and arrived at the Seaboard's Hopewell yard at 1:22 p. m.

Q. Did you accompany that movement?

A. Yes, I did.

Q. What was your position on the train during such movement?

A. I rode one of the cars of the movement.

Q. Approximately where was that car located in the train?

A. It would be difficult to state accurately at the present time.

Q. Well, toward the front, rear, or middle?

A. I would say it would be nearer the front of the cut of cars.

Q. What kind of car were you riding?

A. I believe it was a tank car.

Q. In the run from the Allied Chemical Plant to the Hope- [fol. 6] well yard, were there any switching operations conducted by that locomotive in connection with this train?

A. There were none.

Q. It was a direct run?

A. It was a direct movement from Allied Chemical & Dye plant to the Hopewell yard.

Q. What is the approximate distance from the Allied Chemical & Dye plant to the Hopewell yard?

A. Approximately 11,000 feet.

Q. That would be——

A. Well, roughly, a little over two miles.

Q. I notice that you have the time of departure from the Allied Chemical plant and you also have the time of arrival at the Hopewell yard and you have the distance between the points. At what speed was this train traveling?

A. It would be approximately ten miles an hour.

Q. And that is from your own notes of the investigation?

A. Yes, it is.

Mr. Slipek: May I ask a question of counsel?

(Mr. Slipek spoke with Mr. Hunton.)

Q. Mr. Meyrick, I hand you Defendant's Exhibit No. 2, sir. Display the map so the Court can see it. If you will, take the blue pencil that I have handed you and start with [fol. 7]. that particular run that you referred to, on March 5, and indicate in blue the intersections that this run traversed (and I mean street intersections) and, at the same time, call the Court's attention to any railroad crossings, that is, beginning with the Allied Chemical plant and working your way to the Hopewell yard.

A. To begin with, there is a crossing at grade with the Norfolk & Western Railway at this point, here. It is outlined in green pencil. You want me to mark it in blue, you say?

Q. Yes.

A. Then, immediately after that there is a highway crossing at grade, which is Dupont Street, and that is approximately at that point (indicating).

Q. Is it called Dupont Street on that map?

A. The map indicates that it is Hopewell Street, but the street signs indicate that it is Dupont Street.

Q. Very well. Now, pausing right there, what is the nature of that street crossing?

A. It is a public highway crossing at grade and it provides access—is one of the means of access to these industrial plants, Allied Chemical & Dye and Continental Can Company.

Q. Is it used by these plants in hauling material and supplies to these plants and away from these plants?

[fol. 8] A. Yes, it is.

Q. Do you have any idea what number of people are employed in these plants that it serves?

A. I am sorry, I do not.

Q. Will you say it is a small number, or substantial?

A. I would say it would be a very substantial number.

Q. But you can't——

A. I'm sorry, I wouldn't care to estimate.

Q. Now, sir, carry on to the next crossing, if you will.

A. I find on the map a green line and, according to my notes, there is nothing at this point and, consequently, I don't know what this green line would indicate.

Q. Well, go on with your notes, then, and disregard that for the moment.

A. The next crossing, according to my notes, is Terminal Street, which is approximately here, another street crossing at grade, at approximately this point.

Q. Will you mark it clearly in blue, sir?

(The witness made the designation on the map.)

Q. Now, what type of crossing is that?

A. A street crossing at grade.

Q. Where does it go to? Where does it lead to on either [fol. 9] side?

A. On the righthand side in the direction of movement it would lead into Hopewell Street. At the intersection of Terminal and Hopewell Streets is the headquarters and main fire station of the Hopewell Fire Department.

Q. How many pieces of equipment are maintained at that Fire Department?

A. The Fire Department has four pieces of equipment but the building also houses the emergency equipment of the Hopewell Emergency Squad.

Q. Do they have occasion to use that crossing?

A. Yes, they do.

Q. Your investigation revealed that they do?

A. Yes, they do.

Q. You say they have four pieces of equipment plus——

A. Emergency vehicles for the Hopewell Emergency Squad.

Q. Do you have any idea of the frequency of their runs across that crossing?

A. That would vary with conditions, and it would be hard to give any hard and fast figure on that.

Q. Carry on, sir, to the next crossing.

A. That was Terminal Street, and the next crossing is Randolph Street, or Virginia State Route 10, which is also a public road crossing at grade, and it is at this point [fol. 10] (indicating).

Q. Will you tell the Court what type of safety devices are at that junction?

A. That particular crossing is protected by manually operated crossing gates, operated by an operator in the tower in one of the angles of the intersection.

Q. And that is a widely traveled highway, is it not?

A. Very heavily traveled.

Q. All right. You, of course, have been approaching this last intersection of Randolph Street on Route 10 from the Allied plant, have you not?

A. Yes; that is true.

Q. What situation obtains if you are moving from the Hopewell yard to the Allied plant in reference to that intersection?

A. There is a very sharp curve which materially restricts visibility in the immediate vicinity of the crossing approaching from either direction.

Q. Then, the same situation would obtain——

A. It would apply in either direction.

Q. Very well, sir. Now, if you will, go on to the next crossing.

A. There is a private road crossing at about this point (indicating). It is not indicated on the map. It provides access to a yard in which materials which have been [fol. 11] cleaned—materials which have been removed from cars cleaned out preparatory to loading by the Norfolk & Western Railway, are stored; in other words, waste material.

Q. What evidence was there that these operations were being carried on?

A. Oh, there was a large quantity of these waste materials piled along the track.

Q. Will you explain to the Court how that operation works?

A. As cars are emptied and returned to the railroad, they are placed on a particular track in the yard and there is a force whose duty it is to clean out these cars for future

loading, and the waste material removed from these cars is piled beside the track and removed from that point.

Q. And your investigation indicated that particular area was used for removing the debris and dunnage from that pile?

A. Yes.

Q. All right. Continue, will you.

By the Court:

Q. That is removed by whom? By the railroad, or truck?

A. Frankly, I don't know who would remove it, whether it is done on a contract basis, or whether the railroad removes it, itself, but I imagine it would be removed by motor [fol. 12] vehicles, rather than by railroad equipment.

We next have a crossing at grade with the Norfolk & Western Railroad at this point, and as we progress from the yard we come to the interchange track between the Norfolk & Western Railway and the Seaboard Air Line Railroad, which is at this point.

By Mr. Slipek:

Q. Now, going back to the point before the one you are on now, where is that point? So the record will show where you are in there. You say "at this point."

A. The interchange track—is that what you are referring to? Or the crossing of the Norfolk & Western Railway?

Q. I am asking you to pinpoint the crossing with a little more certainty.

A. All right. This last crossing of the Norfolk & Western is at this point (indicating), and as we proceed toward the yard——

Mr. Hunton: May I interrupt just to clarify the situation?

By Mr. Hunton.

Q. The Norfolk & Western crossing is not a railroad crossing, but the crossing of the railroad?

A. No, sir; the crossing I referred to was a crossing at grade with the Norfolk & Western Railway.

As we leave that point we proceed toward Hopewell yard [fol. 13] and the next point is the Norfolk & Western Railway and Seaboard Air Line Railroad interchange track.

which is located at this point (indicating). Leaving the Norfolk & Western Railway interchange track, here again I find a green line which would indicate some sort of crossing but which does not show up in my notes.

By Mr. Slipek:

Q. All right. Continue.

A. As we leave the Norfolk & Western Railway interchange track we come to another crossing with the Norfolk & Western Railway at grade at this point (indicating). This next crossing is a private road crossing also at grade.

Q. And where does that private crossing lead to?

A. It leads to what is indicated on the map as the Tubize Artificial Silk Company.

Leaving that crossing, next we come to another railroad crossing at grade with the Norfolk & Western Railway at this point (indicating). Immediately after we cross the Norfolk & Western Railway at grade, we come to a public street crossing at grade. This is Palm Street crossing and it is located approximately here (indicating).

Proceeding on from Palm Street we come to Hopewell Street, which is another public road crossing at grade and is located at this point (indicating).

Q. Where does that last street lead to?

[fol. 14] A. It leads to Hercules Powder Company.

Q. Is that a big establishment, or a small operation?

A. It is a relatively large plant.

Q. Do the employees use that crossing in going to and coming from work?

A. Yes, they do.

Q. You have no idea how many people are employed there?

A. I heard the figure five hundred used as an estimate.

Mr. Hunton: If Your Honor please, I object on the ground that it is hearsay.

The Court: Yes.

By Mr. Slipek:

Q. Don't go into what someone told you. That will conclude that portion.

I now hand you a copy of Government's Exhibit 1. Where does this entire movement take place?

A. That is the course of the first movement as outlined, from this point, approximately this point, following the line of the Seaboard Railroad, which is indicated in red, across the various crossings and into the Hopewell yard, which is at this point.

Q. And where is the whole movement? Orient that movement in connection with the town of Hopewell, sir.

[fol. 15] A. Entirely within the city limits.

Q. Can you indicate in blue the position of the fire house that you referred to on the other map?

A. Surely, if I can find Terminal Street. It should be approximately there: it is marked on the map at this point.

Mr. Hunton: If Your Honor please, it is stipulated and agreed between counsel for the parties that there is no necessity for the witness to repeat his testimony with respect to the various crossings and things as to each one of the counts here involved, but that testimony may be taken as going to all four counts here in question.

The Court: Very well. The movements were over the same general trackage?

Mr. Hunton: That is right, sir.

I take it that goes not only for your witnesses, but mine as well.

Mr. Slipek: Yes, indeed, but I won't bar you from including a few more crossings.

By Mr. Slipek:

Q. Now, direct your attention to the next investigation you made on that day.

A. That consisted of a movement from Hopewell yard to the plants of Allied Chemical & Dye and Continental Can Company.

[fol. 16] Q. This was in the opposite direction?

A. It was.

Q. This is from the Hopewell yard to the Allied Chemical plant.

A. That consisted of Engine 1245 with twenty-eight cars, thirteen of which were ahead of the engine and fifteen behind the engine. The movement departed from Hopewell

yard at 12:37 and arrived at the plant of Continental Can Company at 12:52.

Q. Did you ride this particular movement?

A. Yes, I rode this movement.

Q. And where were you riding?

A. I can't recall specifically whether I was on the engine or on one of the cars in the train.

Q. From your notes, how fast was that train traveling?

A. Approximately fifteen minutes elapsed from the time he left Hopewell yard until he arrived at the Continental Can Company's plant, which would indicate between ten and thirteen miles an hour.

Q. Was this a direct run?

A. This was a direct run with no stops en route.

Q. With no switching operations?

A. No switching operations whatsoever.

Q. And it made the same crossings as you stated before?

[fol. 17] A. Yes, it did.

Q. How many employees were there on that train? Do you know?

A. It consisted of either five or six men. I don't recall whether they used three brakemen on that run or not, but it did consist of a fireman, an engineer, and two brakemen, and possibly three brakemen.

Q. Would that hold true for each of these movements?

A. That would hold true for each of these movements.

Q. Do you know where these brakemen were, sir?

A. There again I am going to have to trust to memory. I would say that they were probably in position on cars of the train.

In this particular movement we are pushing thirteen cars ahead of the train. There was a man on the leading car and I can't recall if there was a man between him and the engine or not.

Q. Do your notes indicate anything in connection with the number of cars traversing these respective intersections at the time of this run?

A. Do you mean vehicular traffic on the public street crossings?

Q. Vehicular or pedestrian.

A. I am sorry, I have nothing in my notes that pertains to the volume of traffic over any of these crossings. I do

[fol. 18] know that in the vicinity of the industrial plants traffic at certains —— of day would be heavy.

Mr. Hunton: If Your Honor please, I object to the evidence of what traffic there might be in the vicinity of particular plants. It is what traffic was there at this particular time.

The Court: I think the point is well taken. The objection is sustained.

By Mr. Slipek:

Q. Continue, sir.

A. The next instance was one in which Engine 1758 departed from Track 38 at the Allied Chemical & Dye Company plant with twenty-nine cars and traversed the usual route up to the point of the Norfolk & Western interchange, at which——

Q. What date was that?

A. That was March 5.

Q. All right, continue.

A. At this particular interchange track between the two railroads twenty additional cars were picked up and added to the train.

Q. Point that out to the Court, please, on Defendant's Exhibit No. 2.

A. This is the location of the interchange track and the point at which the additional cars were added to the train [fol. 19] (indicating to the Court on the exhibit).

Q. Then what happened to the train?

A. The train proceeded as usual over the normal route to Hopewell yard. Incidentally, this movement departed from Allied Chemical & Dye Company plant at 3:26 p. m., and arrived at Hopewell yard at 3:52 p. m., the difference in elapsed time being due to the stop to pick up the twenty cars.

Q. And no operation took place on that particular movement other than stopping and coupling on additional cars?

A. That was the only movement; there were no other movements involved.

Q. No cars were cut out of the train?

A. No.

Q. Or rearranged in any way?

A. None whatsoever.

Q. What was the distance from the starting point to the interchange? In other words, you started out at Allied Chemical and you went to the interchange?

A. It is approximately midway between the Allied Chemical & Dye Company plant and Hopewell yard, perhaps not quite midway. I would say it would be closer to Hopewell yard than to the Allied Chemical & Dye Company plant. I can't find in my notes the exact distance between the interchange track and Hopewell yard.

[fol. 20] Q. But you say it is approximately halfway?

A. Yes, I would.

Q. Including the stopping for the picking up of this additional string of cars, what was the average speed of that movement?

A. The notes indicate that five minutes elapsed at the interchange track at which these twenty cars were picked up, so if we subtract five minutes from twenty-six minutes, the total time elapsed between Allied Chemical & Dye and Hopewell yard is twenty-one minutes, and slightly over ten miles. That would be approximately—forgive me while I make these computations.

Q. Take your time, now.

A. That should come out to an average speed of six miles an hour.

Q. Explain in greater detail exactly what occurred at that interchange track.

A. As we arrived at the interchange track the movement stopped at the clearance point of switch which led to the interchange track. At this point the engine was detached from the cars it had brought from Allied Chemical & Dye. It moved over the switch to the interchange, then onto the track, coupled to the cars on that track, pulled them over the track and pulled them over the switch to the cars and as soon as they had coupled on it departed for Hopewell yard.

[fol. 21] Q. Making no stops en route?

A. No stops en route.

Q. All right, sir. Continue on with the next movement, please, sir.

A. I have a movement which took place on the 6th of March. This movement was from Hopewell yard to the plants of Allied Chemical & Dye and Continental Can Com

pany. It consisted of Engine 1758 with eight cars ahead of the engine and fifteen cars behind the engine, for a total of twenty-three cars. This movement departed from Hopewell yard at 11:57 a. m., and arrived at the industrial plants, Continental Can and Allied Chemical & Dye, at 12:15 p. m. with no stops en route. Total elapsed time of eighteen minutes.

Q. That would make an average speed of what?

A. I would say that would put the average between five and seven miles an hour.

Q. And you rode this particular movement yourself?

A. Yes, I did.

Q. Now, these locomotives you are referring to throughout this whole thing were all Seaboard Air Line locomotives, were they not?

A. They were.

* * * * * * *

[fol. 22] Cross-examination.

By Mr. Hunton:

Q. Mr. Meyrick, you have described in your direct testimony certain crossings of streets and of the Norfolk & Western Railroad tracks. Are there any spurs leading off of this track into industrial tracks along the way, and if so, would you be good enough to start at the Continental Can end there on Dupont Street and number the tracks as they lead off into the industrial plants?

A. May I take the map again?

Q. Certainly. Which one would you like?

A. The one on which we originally marked.

(The exhibit was handed to the witness.)

A. (Continuing) I have no notes of industrial tracks; consequently, I am reconstructing this from memory. At this point the Seaboard Air Line freight house, and immediately beyond this there is a track—that serves this—and immediately beyond this there is a warehouse, I believe, at which I noticed a number of cars yesterday. That would be No. 2. I thought that would more likely be between Terminal Street and Randolph Street, rather than where I located it. Then, moving toward Hopewell yard there is a grade crossing with the Norfolk & Western Railway at this point.

However, this track is also accessible from the Seaboard Air [fol. 23] Line track. I noticed there at that point yesterday there were several tank cars at some sort of industry. I would not say it was an industrial plant, but it is some sort of a delivery track. This main line here, which I do not have in my notes, I can't comment upon. As the map indicates, this point at which the Norfolk & Western Railway crosses the Seaboard Air Line at grade, the track is also accessible from the Seaboard track and the map indicates that this particular track leads to Tubize Artificial Silk Company. I have no reason to suspect that the map is not correct. I have not gone into that in any great detail.

Q. There is likewise a Seaboard track going in there, isn't there?

A. Yes. That track would be used interchangeably by either of the two railroads.

Q. It does belong to the track that you are talking about?

A. I am sorry, I am not in position to establish ownership of that track.

Q. Well, which tracks are you in position to show the ownership of, as shown on the map?

A. Actually, if I were to have to introduce evidence to indicate ownership of any of the tracks, I could not do it.

Q. Then, you are just guessing as to which are Seaboard tracks and which are Norfolk & Western?

[fol. 24] A. I am going on the basis of certain fixed signals there which are used exclusively by the Norfolk & Western at grade crossing, to establish ownership.

Q. Didn't you indicate this track going into the Tubize Artificial Silk Company?

A. Well, these Norfolk & Western Railroad fixed signals are what is called a stop board, which means that before Norfolk & Western engines come to that crossing, they must stop before proceeding.

. . . . . .

[fol. 25] Q. Would you identify that point that you are referring to in some way?

A. Approximately here (indicating).

Q. For the record, mark that with an X, if you will, please.

(The witness made the indication on the exhibit.)

A. I don't know where that track leads, but it does parallel the Norfolk & Western Railroad track leading to the Hercules Powder Company.

A. Then, from that point we proceed to that point at which the Norfolk & Western Railway crosses the Seaboard Air Line at grade, and there is another switch and a track which parallels this Norfolk & Western Railway track, which leads in this direction, which would apparently lead to Hopewell China Company, from this map.

Q. Mark that with Y, will you, please?

A. After we cross Palm Street we come to a wye switch [fol. 26] which leads to the Hopewell Subdivision main track.

Q. Now, all of those are industrial spurs, are they, that you have testified to?

A. I wouldn't say that this is an industrial spur; I don't know where it leads; it is a spur track. Nor can I state that this is an industrial spur. I would state——

Q. What I asked you was if you would start at the Continental Can Company and point out and enumerate the industrial spurs branching off from the Seaboard between that point and the classification yard, up here.

A. From positive knowledge, all I can state is that there are three tracks which might be considered industrial tracks.

Q. Which are those?

A. The one which serves the freight house, the one which serves the warehouse and packing plant located between Terminal Street and Randolph Street, and one at this point at which I noticed several tank cars yesterday.

Q. Do you know whether all of the tracks shown on that map are within the yard limits of the Seaboard at Hopewell? [fol. 27] A. It is my understanding that they are.

Q. What passenger service is there on the tracks in question, Mr. Meyrick?

A. None.

Q. On the tracks in question, did you make any inquiry as to where the trains, if they are trains, came from and went to?

A. Would you clarify that just a little bit, please?

Q. I say, on the tracks complained of in the complaint in this case and the movements complained of on the tracks over which those movements went, where did the trains come from and go to? What was their point of origin and point of destination?

A. The points of origin and destination would depend on the direction of movement. The movements to the plants originated at Hopewell yard with delivery to Allied Chemical & Dye and Continental Can.

Q. What do you refer to as Hopewell yard?

A. This point, the classification yard.

Q. So that all of the movements were within the yard limits, were they not, of Hopewell?

A. Yes, they were.

Q. Now, let me ask you this question, Mr. Meyrick: Starting at Continental Can Company, how far are the tracks of the Seaboard paralleled by the tracks of the Norfolk & [fol. 28] Western Railway?

A. You want me to indicate a point on the map?

Q. Yes, sir, starting at the Continental Can Company.

A. Well, let us assume that this is Continental Can. It is not very well defined at this point. The Norfolk & Western Railway parallels it from here.

Q. Put an A there at the beginning, if you will, please.

A. (Marking the exhibit) From this point along Dupont Street and around this curve——

Q. It passes the Seaboard Freight Station, does it not?

A. It does. Then across Terminal Street, across Randolph Street; the Norfolk & Western classification yard is approximately at this point and the tracks are roughly parallel to one another and at this interchange track they are still parallel, and the Norfolk & Western Railway has a track which I understand serves the Hercules Powder Company and would parallel the Seaboard track to this point.

Q. Which is just north of Palm Street, I believe, is it not?

A. Yes.

Q. Mark that B, will you, please?

A. All right (marking on the exhibit).

Q. When you were there on March 5 and 6—I believe [fol. 29] were the dates—did you observe any movements on the Norfolk and Western track parallel to the Seaboard track?

A. I believe there were movements, but I didn't pay any particular attention to these movements. At some point between where the Norfolk & Western begins to parallel the Seaboard and where it stops, I am positive there were movements on those dates which I must have observed but to which I paid no attention.

Q. Did you notice whether the air brakes were connected on the Norfolk & Western trains?

[fol. 30] A. I did not notice.

By Mr. Hunton:

Q. You were there for the purpose of observing whether or not air brakes were connected on trains operating in [fol. 31] this vicinity, were you not?

A. Only Seaboard Air Line trains.

Q. Why did you only look at the Seaboard's? Are you assigned solely to inspection of Seaboard Air Line trains?

Q. Why did you examine only the Seaboard Air Line train?

A. I was investigating a specific complaint alleging non-use of train brakes on transfer movements on the Seaboard Air Line Railway in Hopewell, Virginia.

Q. By whom was the complaint made?

A. The Brotherhood of Railway Trainmen.

Q. To whom?

A. It was made to our office in Washington.

Q. Isn't it your duty to make this inspection without respect to complaints?

A. Not when specifically instructed to investigate a par- [fol. 32] ticular complaint.

Q. What were your instructions with regard to this, then, Mr. Meyrick?

A. To investigate the complaint I have previously outlined and to render a report and if, in the opinion of Inspector Roy and myself, the provisions of the law have been violated, to submit evidence for prosecution of the carrier.

Q. Have you got a copy of the complaint?

A. I don't have one with me, no.

Q. Can you get a copy?

A. I can get you a copy of my instructions,

Q. Have you got a copy of your instructions?

A. I don't have those with me, no, but I can provide those.

Q. Were you instructed to investigate the operations generally, or were you instructed to investigate a specific movement?

A. I was instructed to investigate the transfer movements in question and to determine, in conjunction with Inspector Roy, whether the air brake provisions of the safety appliance law had been violated.

Q. It is a question of your judgment of whether they have been violated?

A. It is.

[fols. 33-37] Q. Have you any instructions from the Interstate Commerce Commission as to what constitutes a violation on which you are to form your conclusions?

A. Would you be a little more specific, please?

[fol. 38] By Mr. Hunton:

Q. Mr. Meyrick, are there any instructions to you from the Interstate Commerce Commission as to what is to determine whether a movement is a switching movement or a train movement?

A. As you have pointed out, it is very poorly defined, but it is our opinion that any movement of a substantial number of cars between two points with no stops en route to set out or pick up would be deemed a train movement.

By the Court:

Q. With no what?

A. No stops en route to either set out or pick up cars.

By Mr. Hunton:

Q. I repeat my question: You say that is your opinion?

A. That is one of the opinions.

Q. And the other opinion is that it may be merely a switching movement?

A. No, there isn't a doubt in my mind that it was a train movement.

Q. I say, there is a contrary opinion, isn't there?

[fol. 39] A. Yes—yours.

Q. That is right. Are there any rules or regulations or anything published by the Interstate Commerce Commission for your information?

A. No, sir.

Q. Or for the information of the railroads?

A. No. For that matter, it is my understanding that these cases are based upon past court decisions, and that is about all I have as a guide.

Q. All right, sir. What cases have you read? What cases are you relying on?

A. Not specifically on any case in particular. May I outline the procedure?

Q. Surely. That is what I am trying to find out.

A. We inspectors in the field are expected to investigate a situation, evaluate it to the best of our ability, and submit our findings to Washington, at which time these findings are subject to further review, and if in Washington they are satisfied that the evidence is conclusive enough, they will lodge the complaint for a prosecution of the carrier.

Q. Now, you said that whether these cases were brought was dependent upon court decisions, did you not?

A. Would you repeat the question?

Q. That previous court decisions determined the question [fols. 40-44] of whether these questions were brought.

A. That is a factor.

Q. Now, what are those court decisions? Do you know?

A. I'm sorry, I can't state specifically.

Q. Have you read any of them?

A. I have, yes.

Q. What ones are you relying on?

A. I'm sorry, I can't tell you.

Q. Have you any record of them?

A. I have notes at home.

Q. You haven't got anything with you here?

A. No, I haven't.

[fol. 45] Q. Mr. Meyrick, I hand you a copy of a letter dated Richmond, Virginia, March 9, 1956, to Mr. C. W. Taylor, Director of Safety and Service, Interstate Commerce Commission, Washington, D. C., and ask if that letter was written by you?

A. Yes, it was, in conjunction with Inspector Roy.

Q. I notice in reading this letter that you call attention to the fact that in some of these movements cars were pushed by the locomotive as well as being pulled by the locomotive?

A. That is right.

Q. Would it make any difference in your conclusions if they were not pushed, but all pulled?

A. I consider the pushing of cars more hazardous than the pulling of cars behind the engine.

Q. I say, would it make any difference in your conclusion that this was a train movement if it were all pulled instead of being part pushed and part pulled?

A. It would not.

Q. I notice, also, you say the distances involved in movements from Hopewell yard to the plants of the Hercules Powder Company and the Celanese Corporation are short, [fol. 46] well under a mile, and not of sufficient length to be deemed train movements; consequently, these movements are given no further consideration in this report. Those movements also cross the same streets, do they not, within the actual space, as the movements here complained of?

A. Hercules Powder Company? I understand the movements to Hercules Powder Company are handled exclusively by the Norfolk & Western.

Q. Then, why did you mention them in your report of Seaboard violations?

A. Because they were mentioned in my instructions.

Q. Then, your instructions did cover the Norfolk & Western?

A. No, sir. The movements to Hercules and Celanese were among those alleged to be train movements.

Q. By what line?

A. The Seaboard Air Line Railroad.

Q. And you found out they were Norfolk & Western?

A. The one to Hercules is handled exclusively by the Norfolk & Western and the one to Celanese is a Seaboard movement.

Q. As I understand it from reading your report, you disregarded the movements to Hercules and Celanese because they were under one mile in length?

A. They were short movements, yes.

[fols. 47-49] Q. At what distance, then, does a movement become a train movement and not a shifting movement?

A. There again, there is no hard and fast rule.

Q. There are shifting movements of two miles in length, are there not?

A. There could be.

[fol. 50] By Mr. Hunton:

Q. So that the same number of cars with the same arrangement of its air brakes, or lack of operation of its air brakes, moving over identically the same tracks and the same crossings, would be considered by you in one instance as a train movement and in another instance as a switching movement; is that correct?

A. You have not phrased that entirely as I would. We have not moved over the same number of crossings if we deliver only to the Norfolk & Western interchange.

Q. No. I am talking about between those two points, the Norfolk & Western interchange, and the so-called Hopewell yard—the same number of cars, the same locomotive, the same number of loads—in one instance with the brakes coupled and in another instance with the brakes uncoupled. In one case you say it was a train movement and in the other you say it was a switching movement, merely because [fol. 51] it would be a train movement if it went beyond that point.

By Mr. Slipek:

Q. Is that what you said—merely because it went beyond that point?

A. Not merely because it went beyond that point, but because the movement was so much longer.

By Mr. Hunton:

Q. Well, how far beyond that point does it have to go before it becomes a train movement?

A. I am not prepared to say.

Q. Does it have to go ten feet?

A. I am sorry, I could not say.

Q. All right. Let's start at this end. Suppose it stops when it reaches the track leading into the Allied Chemical, on the north of Dupont Street. Would it be a train movement then?

A. Would you trace the movement you have in mind, please?

Q. Yes, sir. The same movement that you talk about and say is not to be considered a train movement, except to go to the Allied Chemical plant.

Mr. Slipek: May it please the Court, what these hypothetical questions have to do to aid the Court, I simply don't know.

The Court: Mr. Slipek, is not the real question here to [fol. 52] be determined, so far as the factual issue is concerned, a matter of opinion?

Mr. Slipek: The Court's opinion?

The Court: Yes, sir.

Mr. Slipek: Yes, sir.

The Court: Well, the witness is an inspector, who has had two and a half years' experience in making inspections. I would like to know his answers to the questions. I would have to form my opinion somewhat upon the opinion of others, to a certain extent, and, never having conducted a switching operation myself, I have to be guided by the testimony here. The witness is somewhat of an expert. I think the examination is proper.

* * * * * * *

[fol. 53] By Mr. Hunton:

Q. Mr. Meyrick, in your letter of March 9 you say: "The distances involved in movements from Hopewell yard to plants of the Hercules Powder Company and the Celanese Corporation are short, well under one mile, and not of sufficient length to be deemed train movements. Consequently, these movements are given no further consideration in this report."

Now, I say, assume exactly the same movement and extend it a half a mile; does it become a train movement?

A. A mile and a half?

Q. A half a mile beyond what these are that you do not consider train movements on the tracks here in question.

A. I think, actually, now, you are asking for my opinion?

Q. That is all I can ask for, sir.

A. I think, actually, a movement from Hopewell yard to the Norfolk & Western interchange track, with no stops en [fols. 54-58] route to either set out or pick up cars, could be considered a train movement, but I think it might be difficult to prove, and, as has been already brought out, these are more or less individual decisions.

By the Court:

Q. Mr. Meyrick, let me ask you this question: From Hopewell yard to the interchange, I believe you say, you cross two railroad tracks and the intersections?

A. Three road crossings, and two railroad crossings at grade.

Q. Those railroad crossings—when I say "railroad crossings" I refer to the movement of the train in question—the highway crossings and the railroad crossings, three of one and two of the other; that is five. Are they any more or any less dangerous crossings or intersections than those between the interchange track and the Continental Can Company? Are they of a different type, I should have perhaps said.

A. Basically, they are the same. I would be hard put to differentiate between them. As far as highway traffic is concerned on the rail-highway crossing, that would vary according to conditions, which would also hold true on the railroad crossings at grade, and it would be very difficult to pinpoint it.

[fol. 59] Redirect examination.

By Mr. Slipek:

Q. Now, directing your attention to all four of these train movements simultaneously, was any of them a sorting operation?

A. None.

Q. Was any of them a selecting operation?

A. No.

Q. Was any of them a classifying operation?

A. No.

Q. On the last question you stated that if there was some movement in the classification yard, you would not consider it a train movement?

A. That is right.

Q. And it is there that the sorting, selecting, and classifying take place?

A. Yes.

Q. I think in general I understand you to say that if the train left the Hopewell classification yard and proceeded on to the Norfolk & Western interchange track, you, in your opinion, would consider that a train movement?

A. Yes, I would.

Q. And your superiors might not deem it a sufficient case [fol. 60] for prosecution; is that right?

A. That is right.

Q. And in your opinion and from your experience and knowledge of the type of operation, you would classify that as——

Mr. Hunton: If Your Honor please, I have not been objecting to the leading questions because of the absence of a jury, but I think counsel has gone too far and I do object to that question.

The Court: I think the questions are definitely leading, Mr. Slipek.

By Mr. Slipek:

Q. Did I understand you to say that if the train left the Hopewell yard and then proceeded non-stop—that is, a locomotive with a string of cars attached—to the Norfolk & Western, you would consider that a train movement?

A. Yes, I would.

Mr. Slipek: I will stop right there.

That is all. Thank you very much.

By the Court:

Q. Perhaps I misunderstood the quotation from the letter, or report. I thought in that report you expressed the opinion that it would not constitute a train movement.

A. May I be permitted to clarify that?

Q. Yes, sir.

[fol. 61] A. Inspector Roy and I concluded that due to the length of the movement, our office would not be interested in prosecuting it because it would be a hard case to prove, because it was a short movement. My own opinion was that movement of the cars from the classification yard to the Norfolk & Western interchange could be nothing but a train movement.

The Court: I see.

Recross-examination.

By Mr. Hunton:

Q. If I may read the paragraph in question again from the letter: "The distances involved in movements from Hopewell yard to plants of the Hercules Powder Company and the Celanese Corporation are short, well under one mile, and not of sufficient length to be deemed train movements. Consequently, these movements are given no further consideration in this report."

Do I understand you now to say that you do consider them train movements?

A. I did, under those circumstances, but I did not think my office would accept them and, consequently——

Q. Then, may I ask why you wrote this letter to the Bureau of Safety and said you did not consider them train movements?

[fol. 62] A. I said that due to the length of the trains I thought it would be a hard case to prosecute.

Q. Well, why didn't you say that, instead of saying they would not be deemed train movements?

A. I suppose, actually, it is just a question of phraseology.

Q. Take your letter there and read it over and let me know how much of it is just a question of phraseology and how much of it is not—how much of it you meant and how much of it you did not mean?

A. Do you wish to refer specifically to this first paragraph again?

Q. No, sir; I want to refer to the whole letter.

A. I would let it stand as it is.

Q. That is the only paragraph, then, that you repudiate?

A. I don't repudiate that.

Q. Well, what do you do with it?

A. My personal opinion is, if I were to make the decision, I would consider it a train movement.

Q. Why didn't you so report to your superiors in Washington?

A. The report is dated March 9 and I do not remember too many of the circumstances connected with it. I do feel that the motivating factor was that it would not be con- [fol. 63] sidered a good case because of the short movement.

Q. But you do feel that the other movement would be a good case because it would be twice the length?

A. Yes.

Q. And that is the only difference between the two, isn't it?

A. Yes.

Mr. Hunton: I have no further questions.

By the Court:

Q. Is there any difference in the grade between the Hopewell yard and Continental Can, or is it all pretty much the same grade—level?

A. There is no perceptible difference. There may be some difference in grade existing. That I have not gone into with the Engineering Department, but the difference in grade is not perceptible.

. . . . . .

[fol. 64] Redirect examination.

Q. What increase in hazard is incurred by the fact that the run is longer?

A. I do not really believe it is an increase in the actual hazard involved, but the fact that it is easier to prove it is a train movement. In other words, if it comes to a trial, I think the position is that it is easier to prove a long movement a train movement than a relatively short movement.

Q. Are you able to point to anything except the difference in the distances which should constitute a distinction be-

tween the two, or which you call a distinction between a short run and a long one, assuming that they have practically the same terrain and the same approximate intervals between crossings? What would be the distinction between the two?

A. Well, there is a greater number of crossings to be [fol. 65] traversed and, consequently, there is an increase in hazard, but to what extent, I would not be prepared to say. That, too, would vary with conditions at the time of the movement.

* * * * * * *

Chester E. Roy, called as a witness by and on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination.

By Mr. Slipek:

Q. Mr. Roy, state your name, residence, and occupation, please.

A. Chester E. Roy, Inspector of Safety Appliances, Interstate Commerce Commission, Washington, D. C.

Q. Tell me, sir, how long have you been so employed?

A. Approximately six years.

Q. In that same capacity?

A. Yes.

Q. What was your occupation prior to your present service with the ICC?

A. I was employed in train service as a conductor and [fol. 66] brakeman on the Kentucky and Tennessee Railroad.

Q. Over what period of time?

A. From 1922 until 1951, near the middle of '51.

Q. Almost thirty years?

A. Approximately.

* * * * * * *

[fol. 67] Mr. Hunton: May it please the Court, this gentleman is also an inspector and made the inspection with the original witness, Mr. Meyrick. I am perfectly willing to stipulate that his testimony would be the same and that he would testify to the same facts, to save time.

[fol. 68] The Court: He has been in the courtroom and has heard the testimony of Mr. Meyrick.

That is correct, is it not, Mr. Roy?

The Witness: Yes, I heard the testimony.

By Mr. Slipek:

Q. Well, after hearing the testimony, if you were called upon to testify further in connection with these four particular offenses, would you say, sir, that your testimony would be in substantial accord with the testimony of Mr. Meyrick?

A. My testimony will substantiate his testimony in regard to these particular movements, but there are one or two other items that I would not substantiate; that is, all these various questions.

Mr. Slipek: Very well, sir.

May it please the Court, in view of the statement just made with regard to stipulating that his testimony would be the same, we can go ahead and have it so admitted, subject to the reservations that he has now made, and we could then go into the subject of the reservations.

The Court: Is that agreeable, Mr. Hunton?

Mr. Hunton: That is entirely agreeable.

The Court: Very well.

[fol. 69] By Mr. Slipek:

Q. Now, sir, you stated that your testimony would vary in some particulars from the testimony of Mr. Meyrick. One by one, will you enumerate or spell out the differences?

A. There is a slight variation in the computation of distances. May I refer to these notes?

The Court: Yes, sir.

A. (Continuing) Computing the distance from the entrance to Hopewell yard—that was the last switch just off of Hopewell Street—to this interchange track was roughly 2,087 feet. We arrived at that figure by walking it, tallying the rails, and multiplied by the standard rail length of 39 feet. My notes show that it is 77 rail lengths from the switch in Hopewell yard to the switch leading onto the interchange track. That is one point.

Q. Before we go on to the second point, will you, with this red pencil, indicate the position of the switch at the Hopewell classification yard?

A. Now, which switch do you mean?

Q. From where you started your computation.

A. We did not use any of these distances down in here. We started at this switch, at this point, here.

Q. Make a big X there. Label it "Switch," if you will.

A. (Marking on the map) We continued on down—Do [fol. 70] you have that marked "Interchange"?

Q. No. You trace it the best you can. Just take all the time you need.

A. There is Hopewell Street. I have a sketch here that I made from my notes, which is rough—very rough.

Q. All right, sir. Consult your sketch.

A. Here is Palm Street and N. & W. Railroad. This should be the interchange track right in here, I would say. I think this is it, right here.

Q. Orient yourself in connection with it and make yourself sure.

A. This thing is turned backward to me.

Q. All right. Turn it any way you would like.

A. I am looking at it upside down.

Q. That is the area you walked; is that right?

A. Yes. This should be the interchange, right along in here, in this vicinity. I am not too familiar with this map. It is along in here somewhere.

Q. I want you to put the switch on the interchange.

A. Well, from this map I am still not sure that is your interchange.

Q. Well, maybe if I could get another map. Do you think you could locate it more readily on the City of Hopewell map?

(Handing the witness another map.)

[fol. 71] A. This interchange is right in this vicinity, right in there somewhere.

Q. Put a big X there.

A. Right there (marking on the map).

Q. Now, go back to the classification yard. You were talking about the distance from the Hopewell classification yard to the interchange switch. Will you please continue? You were telling the Court the differences between your testimony and that of Mr. Moyrick, and the last point of difference was the distance from the switch at the classifica-

tion yard in Hopewell to the switch at the interchange track. That brings you right up to where you were.

A. The difference is not in the testimony, but my notes—I wanted to testify, that is, my notes show, that this distance was approximately 2,087 feet as computed by us.

Q. Now, have you finished with that distinction?

A. That's right. I am through.

Q. Will you, then, go on to the next point of difference?

A. There is no difference in the testimony between what I would have to offer and what Mr. Meyrick said. The only point that was not brought out was in connection with the N. & W. Railroad tracks.

Q. Well, what about it?

[fols. 72-73] A. The N. & W. Railroad together with the Seaboard Air Line serves these industries down in the vicinity of Continental Can, Allied Chemical, and Nitrogen. The cars to be delivered from the Seaboard to these plants are classified and bunched in the Seaboard classification yard at Hopewell. The cars that the N. & W. Railroad places to these same plants are classified and bunched in the N. & W. yard at Hopewell, the east end of which is almost adjacent—well, I would say it is almost equivalent to the Randolph Street crossing. That is the crossing that is protected with gates. So, trains from the N. & W. delivering to this plant would originate at this classification yard at Randolph Street and would traverse approximately 4,000 feet, that is, paralled with the Seaboard tracks leading into the plant, which would be under a mile distance.

Mr. Slipek: Do you have any other distinctions or differentiations to make?

The Witness: That is all I have.

[fols. 74-75] Roy E. Kean, called as a witness by and on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hunton:

[fol. 76] Q. Mr. Kean, would you be good enough to describe to the Court the crossings, both of highways and of

other railroads, and the spur tracks breaking off from the Seaboard tracks from the Continental Can Company to the Hopewell classification yard, please, sir?

A. Starting at the Continental Can Company, there are four tracks which break out into this plant, two of which are controlled by the Norfolk & Western Railroad and two of which are controlled by the Seaboard. The two tracks controlled by the Seaboard, which lead in a southward direction to the switches at the plant of the Allied Chemical & Dye Company, some 3,000 feet, are known as the Hummel-Ross lead and the Roosevelt track. These are the two operating tracks that we use. There is a track breaking to the left into the Solvay Division of the Allied Chemical plant. There is a switch breaking to the right that goes into the Allied Chemical & Dye. In addition to the Norfolk & Western and the Seaboard operating over these tracks into both sides of the plant, the Allied Chemical & Dye also has engines which operate in that area, and there is a common road crossing known as Hopewell Street, where there is a crossing at grade with the Norfolk & Western Railroad and a [fols. 77-79] road crossing. You continue southward—no, that first street is Dupont Street and then you have Hopewell Street. You continue south and on a slight curve to Terminal Street, which is State Road No. 10, which is a crossing at grade protected by gates manually operated by what we term crossing watchmen.

Q. Is that the main traveled highway from Hopewell to Petersburg?

A. Well, frankly, I don't think so, Your Honor. There is some travel that way, but that is the main traveled way between Richmond and Norfolk, and farther southwest is State Road 36, which is the main traveled road between Hopewell and Petersburg.

Q. That is the one that goes in by Camp Lee?

A. Yes, sir.

Q. This is No. 10?

A. Yes, sir.

Q. It goes down toward Smithfield and Surry?

A. That is right; down in that area, there.

[fol. 80] By Mr. Hunton:

Q. Mr. Kean, is there any passenger service to Hopewell?

A. No passenger service.

By the Court:

Q. Do any of these tracks between the one terminus and the other which have been discussed today carry through trains?

A. None at all, Your Honor; all switching movements.

Q. All switching movements?

A. Yes, sir.

Q. No through traffic goes through there?

A. No, sir.

Q. Nothing is brought over those tracks by a train in the ordinary course of operation?

A. No, sir. Everything in this area is moved between our assembling yard, which is across Hopewell Street, which is just opposite the Hercules plant, and the various industries out in the Hopewell area.

[fol. 81] By Mr. Hunton:

Q. Mr Kean, are there any trains or cars delivered by a locomotive from a point toward Bellwood beyond the Hopewell yard limits that do not stop at the classification yard in Hopewell?

A. There are none, no.

By the Court:

Q. Let me ask one question there. If incoming freight consigned to Hopewell comes in, it goes first to the classification yard?

A. If I may describe it this way, an incoming freight train terminates at the classification yard and there the work is taken over by the yard or switch engine crew, whichever you may want to call it, but that is the terminus of the freight train.

The Court: I see.

By Mr. Hunton:

Q. What happens to the train when it arrives at the classification yard so far as the distribution of cars is concerned?

A. The cars are switched and blocked according to the consignee intended.

By the Court:

Q. Is this switching yard used by both the Seaboard and the Norfolk & Western?

[fols. 82-84] A. No, sir. There are two separate operations over there from a switching standpoint.

Q. This interchange is where——

A. That is where we interchange cars between the two lines.

Q. And not in your switching yards?

A. It is what we know as a designated interchange track.

Q. But that is not in the switching yard proper, is it?

A. It is within the switching yard limits. I will have to say that.

Q. What I mean to say is that it is not within the classification yard?

A. Oh, no.

The Court: I was using the term incorrectly myself.

By Mr. Hunton:

Q. Mr. Kean, if you would point out to His Honor on the plat the location of the Seaboard Classification yard and the location of the Norfolk & Western classification yard I think that might clarify it.

By the Court:

Q. The Seaboard classification yard is right here (indicating)?

[fol. 85] By Mr. Hunton:

Q. Now, Mr. Kean, what is the speed limit for the Hopewell yard area of the Seaboard?

A. In our Operating Rules our movements are termed "Yard Speed," which is the ability to stop within one-half the range of vision.

Q. Have you the rule book containing that rule?

A. Yes, sir, which rule is defined on page 11 of our cur-

[fol. 86] rent Operating Book.

By the Court:

Q. When you refer to range of vision, that will vary, I assume, over the track?

A. Oh, yes, and weather conditions.

Q. At points your vision is much farther than at other points?

A. That is right.

Q. As coming around a curve?

A. That is right.

By Mr. Hunton:

Q. What is the rule to which you referred? Read it into the record, please, sir.

A. It is our Yard Rule No. 93, which reads in part as follows:

> "Stations having yard limit boards will be designated in the time tables and by special instructions and the limits will be indicated by wayside signboards reading 'Yard Limits.' Trains and engines must not exceed yard speed on moving on yard tracks."

That is found in our Rule 93, page 31 of the current Rule Book of Operations.

Q. Do you know whether or not the yard at Hopewell is so marked?

[fols. 87-88] A. It is; yes.

Q. And is the yard at Hopewell so designated in your operating time table?

A. It is, and the current time table is Issue No. 4 which was issued effective December 3, 1956.

By the Court:

Q. Well, what about this rule concerning operating so you can stop within half the distance of visibility? Is that a written rule?

A. Yes, that is a written rule, found on page 10 of the Rule Book and the definition of "speed" is "a speed that will permit stopping within one-half the range of vision."

[fol. 89] By Mr. Hunton:

Q. Who determines when a train, or one of these cuts of cars, or whatever you call it, is to move out of the classification yard toward Continental Can?

A. That, of course, comes under the immediate jurisdiction of the agent, Mr. Morrison.

[fols. 90-91] Q. And who determines when a similar movement in the reverse direction, from Continental Can, is to be made?

A. Again, that would be the immediate supervisor, Mr. Morrison.

Q. How does a train crew know where to stop and cut off cars, if any, or where to pick up additional cars?

A. Generally speaking, it is based on the listing of the cars and on the instructions received from the agent, who is Mr. Morrison.

[fol. 92] Q. Mr. Kean, approximately when was the line established by the Seaboard into Hopewell?

A. To the best of my recollection, it was 1931 or 1932.

[fol. 93] Q. Do you have records with respect to accidents that may have occurred within the yard limits of Hopewell?

A. The records indicate that in 1941 there were two crossing accidents involving a train and vehicular traffic, one at Hopewell Street and one at Palm Street. There was another accident, in 1944, on the crossing at Hopewell Street, and there was another accident at Palm Street in 1954. That is the only record we have of any accidents occurring in that area.

By the Court:

Q. Were they collisions with motor vehicles?

A. Yes, sir.

By Mr. Hunton:

Q. Did any of those accidents occur at a time when air brakes were in use?

A. Strangely enough, the one occurring in 1954 occurred with an engine and twelve cars in which there were air brakes in service.

Q. Did the others occur when air brakes were used?

A. Air brakes were not in service.

By the Court:

Q. Am I correct in understanding from your answer that at times air brakes are in service in these movements and at other times they are not in service?

[fol. 94] Mr. Hunton: I was going to develop that, if Your Honor please, right now.

The Court: I beg your pardon.

By Mr. Hunton:

Q. Will you state over what period of time these movements into Hopewell yard have been handled with air brakes in use and over what period of time without the use of air brakes?

A. Air brakes were first used on these movements in Hopewell yard September 7, 1951. They were continued up until January 10, 1956.

By the Court:

Q. Prior to 1951 they had not been used at all?

A. They had not been used at all.

Now, along in the first part of September, there was a visit made to the Hopewell Terminal by Inspectors Roy and Dennis, I believe, at which time they voiced the opinion that the air brakes should be coupled on these movements and the Seaboard acquiesced in their request, and that was when it was first started. On January 10, 1956, mostly for operating reasons, we discontinued coupling the air on these cars and went back to the old procedure of operation, which resulted in the visit of Inspectors Roy and Meyrick on or about March 5 or 6.

[fol. 95] By Mr. Hunton:

Q. When did you start using air brakes again?

A. Pending the decision in this particular case, we started back to using air brakes on March 10, 1956.

Q. What has been the effect so far as time is concerned in the use of the air brakes?

A. It has affected the work in that it slows the work down, because, as has been described here this morning, the overall movement is slightly in excess of two miles. For example, you have a cut of cars, regardless of the number but we will take the average number of twenty cars, leaving the classification yard, on which all of the air hose have got to be laced and the train charged——

Q. Explain to the Court the technical terms "laced" and "charged."

A. The air hoses are the hose between each car which must be coupled between each car and, after that, they are coupled to the air hose on the locomotive which, in turn, is

attached to the compressor and pump and that charges the train line for the purpose of applying and releasing the brakes. Normally, you can figure fifteen to twenty minutes longer in getting a movement started, and then when you reach the ultimate end of the trip, or the run that you are making, before these cars can be switched out it is necessary that you then go along and bleed, by means of a bleed cock [fol. 96] which is attached to the reservoir and the air brake system on the car—the air has go to be bled off on every one of those cars and normally you can figure twenty minutes longer on that. So, on each movement that we operate we estimate that it takes forty minutes longer to make the movement than if we did not make the movement with the air brakes coupled.

By the Court:

Q. Does it require additional personnel?

A. Yes, sir. In fact, for the first time in the history of the operation at Hopewell, we had to put on five engines over there due to the operating difficulties we were running into over there, due to this and other things, which is two more than we ordinarily work over there.

Q. That was on account of the difference in time?

A. It was due to this. Of course, there were other things entered into it, too, but this was one of the contributing factors.

By Mr. Hunton:

Q. What is your estimate as to the increase in cost in the use of air hose?

A. Well, we figure with the crew wages alone on a switch engine crew it costs us ten cents an hour, and where three switch engines—and I believe it has been running that, approximately—ten moves are made between these various [fol. 97] industrial locations and the yard. Figuring ten moves at forty minutes to the move, that is 400 minutes. You can very readily see, if you have nearly an eight-hour minimum day, it will cost you around eighty hours a day, and based on 365 days a year, it is running in the vicinity of $30,000 a year for crew members alone.

By the Court:

Q. That is for additional crew members that you would not need otherwise?

A. That is right.

. . . . . .

[fol. 98] Q. Mr. Kean, do you go to Hopewell frequently?

A. Oh, yes.

Q. Have you seen the trains of cars and locomotives of the Norfolk & Western?

A. Oh, yes.

Q. Operating parallel to the Seaboard?

A. Yes.

Q. Have you observed whether they operate with air brakes or without air brakes?

A. They operate without air brakes.

Q. Have you ever seen them operate with air brakes on the Norfolk & Western in this particular area?

A. Not to my knowledge, no.

By the Court:

Q. Mr. Kean, do you have a record with respect to injuries to crew members in these operations during the period when you operated with and when you operated without air brakes?

A. We have had only two injuries that have occurred over there, to my knowledge, and neither of those was due in any way to the movement between industries and the [fol. 99] classification yard. In fact, these injuries that occurred, one of them occurred from a man getting off of a car in the process of switching in the classification yard, and the other one occurred when a man permitted his arm to slip and hang in a grab-iron while he was swinging on the car.

Q. Was the car moving?

A. The car was moving, but it would not have made any difference at all, because his hand slipped on the grab-iron.

Q. You mean they are the only injuries you have had in the yard over there?

A. They are the only ones I know of.

Q. Both of them were on classification movements?

A. Both of them were on classification movements.

Q. You had no injuries in this movement from the classification yard over to the industry?

A. Not that I know of, Your Honor.

. . . . . .

[fol. 100] Mr. Hunton: No further questions. The witness is with you.

Cross-examination.

By Mr. Slipek:

Q. Mr. Kean, I believe you stated that Route No. 10 was on Terminal Street, didn't you? Did I understand you correctly?

A. Possibly I did.

Q. I would like for you to consult a map and see if that is still your answer.

A. No, that is incorrect. Route 10 is south of Terminal Street.

Q. What street does it run over?

A. Randolph Street.

Q. Very well. Thank you, sir.

Now, you read to the Court from the book certain yard rules.

A. That is right.

Q. Are you telling the Court that those yard rules are always obeyed, sir?

A. To the best of my knowledge, I have got to answer that Yes.

[fol. 101] Q. All right, sir. Thank you.

Now, directing your attention to the four accidents—I do not have the dates—you say in one year there were two?

A. In 1941 there were two, one at Palm Street and one at Hopewell Street. I may have the month on that for you.

Q. No, that is not essential. Now, the next one occurred when?

A. 1944.

Q. And that was at Hopewell Street?

A. Hopewell Street, yes, sir.

Q. And the next one occurred at Hopewell Street?

A. No, at Palm Street, '54.

By the Court:

Q. Is Palm Street the crossing which has the manually operated——

A. No, sir, Randolph Street, or Route 10. The protection of these crossings where the accident occurred is the standard cross-buck signs.

By Mr. Slipek:

Q. The only street that has manually operated protection is Randolph Street?

A. That is right.

Q. And the others are protected by the cross-buck sign? [fols. 102-107] A. The others are protected by the cross-buck sign.

Q. You stated, "Mostly for operating reasons, and other reasons, we have discontinued the use of brakes." When was that?

A. That was in January; on January 10, 1956.

Q. What were those operating reasons that you have referred to here?

A. Trouble——

Q. Outside of the time element.

A. The time element definitely was involved.

Q. What other reasons?

A. Well; the operating reason was the dispatch and the receipt of the traffic coming in and out of that area. There was an increase, I would say, of some thirty or thirty-five percent in business in that particular area along about this time.

[fol. 108] Q. When you discontinued the brakes, then, what you actually did was equate the safety factor against the expense factor and decide to dispose of the brakes; is that right?

A. At no time did the equasion of the safety factor against the expense factor enter into the argument. We were trying to operate a railroad.

Q. Did you consider the safety factor?

A. The fact that there have been no accidents and no injuries occurring to employees and the fact that there have been so few crossing accidents or vehicular accidents, I think, speaks for itself.

Q. Did you take safety into consideration?

A. My friend, we always take safety into consideration.

Q. Then, did it enter into your deliberations as to whether you would discontinue these brakes or not?

A. Would you restate the question, please?

Q. I asked you whether you considered safety and your answer was that you did.

A. We always consider safety.

Q. And properly so. The next question was, Then you [fol. 109] did take safety into consideration when you decided to dispense with the use of these air brakes?

A. Definitely, we did.

Q. What were your thoughts then on the safety factor, at that time?

A. My thoughts were that there was no undue or unusual risk, and that is borne out by the fact that during the sixty-day period that we did operate there without the brakes nothing unusual happened; there were no injuries and no crossing accidents.

. . . . . .

[fol. 110] Joseph R. Hoag, called as a witness by and on behalf of the defendant, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Hunton:

Q. Mr. Hoag, would you state your name, residence, and occupation, please?

A. Joseph R. Hoag; Jacksonville, Florida, is my residence; and my occupation, I retired from Civil Service employment and am doing a little work now for the Seaboard on a monthly retainer basis.

Q. Before your retirement as a Civil Service employee, what was your occupation?

A. I was an Inspector of Safety Appliances.

Q. And for what organization?

A. The Interstate Commerce Commission.

Q. How long were you employed in that capacity, Mr. Hoag?

A. Thirty-two years.

Q. Prior to that, what was your occupation?

A. I was working on the Northern Pacific for twenty years. I was a brakeman and conductor and two years as a Trainmaster.

Q. I think we have gone back far enough, Mr. Hoag.

Did you, at the request of officials of the Seaboard, make [fol. 111] any examination with respect to the movement of trains, or cuts of cars, or transfer movements from the classification yard at Hopewell to the industries between there and the James River?

A. I did.

[fol. 112] Q. Was there any difference between your duties and those of Mr. Meyrick, who testified here this morning?

A. No, they were the same duties.

Q. Mr. Hoag, would you state, in the light of your experience with the Interstate Commerce Commission, what in your opinion was the nature of the movement from the Hopewell classification yard to the Continental Can [fol. 113] Company?

A. I only made that one inspection up there; I have only been in Hopewell one time, and I made a report on it to Mr. Stone. I can read to you my report if you care to hear it.

Q. Did you consider it a train movement, a switching movement, a transfer movement, or what?

A. I considered it a switching movement.

Q. Did you so advise the Seaboard Air Line?

A. Yes.

Q. What were the factors that led you to that conclusion?

A. Well, I figured it was merely a switching movement for the distribution of cars to the different industries around Hopewell and was controlled by yard speed, which was a speed that enabled them to stop within one-half the range of vision. I believe two railroads crossed at grade. Those railroads were spur tracks of the other line and they were protected by fixed signals, namely, a stop board on that line where their trains had to stop before crossing over the Seaboard tracks; the Seaboard had the right of way. The most important crossing was protected by gates. The other

crossings were protected by railroad crossing signs, what we call cross-buck signs, and the speeds being so slow and the number of cars— I asked about the average number of [fols. 114-115] cars that were handled in the train and they said it would run around twenty-five cars, the average number, and, moving at yard speed, I figured the engineman could control the speed of the train and stop within one-half his range of vision and there would be no danger in the movement.

[fol. 116] Q. Is the question of whether the movement takes place on a main line or on a yard track material?

A. Not too much. A violation can take place on a yard track provided that there are safety hazards on it and other trains using it, and whether the view is good, and whether the speed is regulated on that track.

Q. Is the fact that other trains move from one destination to another a material consideration—between two stops, say?

A. Yes, it is a material consideration, but it is not a binding fact.

Q. In determining whether it is a train movement, does the question of whether there are movements on regular schedule enter into the question?

A. Yes, it would have something to do with it.

Q. If the movement were a scheduled movement, would you consider it more likely to be operated as a train movement or as a shifting movement?

A. I would be more likely to treat it as a train movement.

. . . . . .

[fol. 117] Cross-examination.

By Mr. Slipek:

. . . . . .

[fol. 118] Q. I wanted to clarify that in my mind. Thank you, sir. Then, sir, you have no knowledge of your own in regard to the four movements with which we are concerned today?

A. No, sir.

Q. None whatever?

A. None whatever.

Q. And you did not render an opinion on these particular four movements, did you?

A. No.

Q. Isn't it true that in your duties as an inspector for the ICC you could have a non-scheduled movement and it would still be held to be a train movement rather than a switching movement?

A. Oh, yes. Extra trains are non-scheduled trains on any railroad.

Q. And isn't it true that in the course of your duties the yard speed could be exactly that in the book and it could still be held to be a train movement instead of a switching movement? Do you understand that?

A. Repeat that.

Q. My question is this, sir: In your investigations con- [fols. 119-120] ducted while you were an ICC inspector, isn't it true that you could have had a situation in which the train and the cars maintained the yard speed and yet it could be considered to be a train movement instead of a switching movement?

A. Oh, yes.

Q. And that would be likewise true even if there were a switching crew on the train?

A. Yes.

Q. And it would also be true no matter how many cars were on it; isn't that right?

A. Yes.

Q. That is what I was getting at. May I see that booklet, please?

A. (Handed to counsel) Do you want me to open it?

Q. No, sir, but will you tell the Court the date of that booklet, please?

A. It is July 1940.

Q. Isn't it true that there have been some changes in that book and some supplements to it since that time?

A. Yes, very true. There is a supplement issued every year.

Q. And these supplements do sometimes contain changes, do they not?

A. Yes.

[fol. 121] W. F. Morrison, called as a witness by and on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hunton:

Q. State your name, residence, and occupation, please.

A. W. F. Morrison; residence, Hopewell, Virginia; occupation, Agent for the Seaboard Railroad.

[fol. 122] Q. How long have you been Agent for the Seaboard at Hopewell, Mr. Morrison?

A. Since March of 1954.

Q. How long have you been employed by the Seaboard?

A. Since January of 1937.

Q. State briefly, if you will, please, what your duties are as agent of the Seaboard at Hopewell.

A. The supervision of the entire terminal.

Q. That is the reason I said "briefly." What in general are those duties?

A. Well, the supervision of the yard, the agency, the mechanical department, and any problems that may come up with the company.

Q. What is your relationship to the movement of cars into or out of the Seaboard classification yard at Hopewell?

A. Well, we issue instructions to our yard people as to the destination, as to where the cars on the outbound move go and, on the inbound move, as to what industries they are to be placed at. Of course, we accept the orders for the loads, and where to be spotted, and what empties to be placed.

Q. For instance, in connection with an order for cars to move out of the Atmospheric Nitrogen plant of Allied Chemical, how would that order be handled with you?

[fol. 123] A. Well, sir, the plant furnishes us with a list with the correct initial and number, and that information is passed on to the yard people to go to the plant and pull those cars and line them up in the train accordingly.

Q. State whether or not that movement of the engine comes under your jurisdiction.?

A. Yes, sir.

Q. Where is your office, Mr. Morrison?

A. The office is in the freight station.

Q. Where is that with reference to the classification yard and with reference to the Continental Can Company plant?

A. Do you mean in distance?

Q. Yes. Approximately how far is it from each of those places, one at one end and one at the other?

A. Well, I would say approximately half a mile from the Continental Can—I am speaking of the office to the yard now—from the A.C.D. Corporation——

Q. And where is the office with respect to the interchange for the Norfolk & Western? About how far apart are they?

A. Just about two blocks from the Norfolk & Western. I am speaking of their office, now.

Q. How far is it from the interchange track?

A. Less than half a mile.

[fol. 124] Q. Have there been any accidents during the time that you have been the agent at Hopewell, either crossing accidents or injuries to train personnel, Seaboard employees?

A. As to the crossing accidents, there has been none, sir. Now, you say injuries to the Seaboard personnel?

Q. Yes, to employees.

A. We refer to a personal injury, now. A trainman stepping down from the sill step left his arm hanging in the grab-iron. That had nothing to do with the movement of the train.

Q. Where did that occur?

A. One was in the classification yard and the other was in the Cal track. The train had come to a complete stop and the man stepped down and left his arm in the grab iron.

Q. What are the protections provided at the several street crossings? I believe it has been testified that Route 10 crosses the Seaboard track here in Hopewell.

A. Yes, sir. That is the Randolph Road crossing.

Q. What kind of crossing protection is there?

A. They have gates.

Q. And what is the crossing protection provided at the other street crossings?

A. They have cross-bucks.

Q. That is the——

A. Cross-arms.

[fol. 125] Q. How many street crossings are there between the Continental Can Company's plant and the classification yard?

A. Do you want me to name them?

Q. If you can, yes, sir, and use the plat if you want to refresh your memory.

A. No, sir, I know them from memory.

Coming off the Hummel-Ross lead, or the Continental Can lead, first, proceeding to the yard, we cross Dupont Street; next would be the Terminal Street crossing; next, Randolph Road; your footpath; another little crossing going into Tubize that doesn't even have a name; then you come over to Hopewell Street; then your Palm Street crossing; and you enter the yard.

Q. Which is the most heavily traveled of all those?

A. Of course, the Randolph Road crossing is the most heavily traveled.

Q. How about the Terminal Street crossing? How much volume of traffic is up there?

A. I could not give you the exact number of cars——

Q. If you could give something in comparison with the Randolph Street crossing. That is what I mean.

A. Oh, there is practically nothing there as compared with Randolph Street. Randolph Street is the main highway there.

Q. How about the Dupont Street crossing?

[fol. 126] A. Well, of course, your cars coming from the plants, or employees of the plants going back and forth through there, there is considerable traffic through there.

Q. What times do changes of the traffic occur?

A. I would say in the morning around seven a. m., and in the afternoon about four or four-thirty, when the plants are changing shifts, or three-thirty.

Q. What is the hour—I don't mean the precise hour, but when are these movements into and out of the Allied Chemical & Dye and the Continental Can generally made?

A. Normally, the movements into the plants are made in the morning. That is the delivery of the empties.

Q. At what time?

A. We have to get in there at ten a. m., and coming out, pulling the loads in the afternoon, any time from four o'clock up to seven or eight at nighttime.

Q. What about the Hopewell Street crossing? What is the volume of traffic there as compared with the Randolph Street crossing?

A. The Hopewell Street crossing is the crossing that handles the traffic that moves into the Hercules Powder Company plant. That is practically all the traffic that moves in there.

Q. What time does the traffic move into and out of that [fol. 127] plant, generally?

A. Prior to eight a. m., and at four o'clock in the afternoon; between three-thirty and four in the afternoon.

Q. I think you said that there was a footpath in there. By whom is that used?

A. I think some of the people that live in B Village over there use it to go to the grocery store. It is just a little old path that they have been using there for years. I don't know of anybody that actually uses it other than those people that live around there.

Q. Now, the next crossing, I believe, is Palm Street, isn't it?

A. Palm Street, is correct.

Q. What is the traffic on Palm Street as compared to Randolph Street?

A. Well, the Palm Street traffic is much lighter than the Randolph Street traffic, because the people going to Petersburg, leaving the Hercules plant, come across Hopewell Street and come up Palm Street and head toward Petersburg and Colonial Heights. That is mostly in the afternoon, too, and in the morning.

Q. What is the next crossing, please?

A. Going into the yard?

Q. Going into the yard.

A. Palm Street would be the last one.

[fol. 128] Q. What is the one before that?

A. I beg your pardon. It is Hopewell crossing, going into the yard. Palm Street is the one just prior to that.

Q. What is the plant that has been closed down and moved to South America?

A. Well, that is the old Tubize. Celanese Corporation is the one that moved to Charlotte.

Q. Which street serves the old Tubize plant?

A. Well, sir, the Palm Street crossing, which crosses our tracks going into the Hercules lead track, and also the lead of the Norfolk & Western going into Hercules.

Q. Mr. Morrison, where is the Norfolk & Western track located that serves the Allied Chemical plant and the Continental Can plant?

A. It is adjacent to our track, right there at the freight station, going into the plant.

Q. Does it run parallel or across your tracks?

A. It runs parallel by the freight station.

Q. Can you see the trains moving on the Norfolk & Western tracks fronr your office window?

A. Definitely so, sir.

Q. Can you see whether or not the air brakes are connected on those trains?

A. Yes, sir.

[fols. 129-132] Q. In your observation, have you ever seen the air brakes connected on those Norfolk & Western movements by your window?

A. Not to my knowledge, no, sir, not going into the plant or coming out, no, sir.

Q. When I was in the office the other day, did you notice the Norfolk & Western train passing?

A. Yes, sir.

Q. Was the air brake connected on it?

A. It was not, no, sir.

Q. Where was that movement on the Norfolk & Western going?

A. Sir, they were pulling empties out of the plant at that time.

Q. What plant was that?

A. Allied Chemical & Dye.

[fol. 133] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 134] In United States Court of Appeals for the Fourth Circuit.

No. 7534

United States of America, Appellant,

versus

Seaboard Air Line Railroad Company, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

Argued March 6, 1958.

Before Sobeloff and Haynsworth, Circuit Judges, and Williams, District Judge

Edwin J. Slipek, Assistant United States Attorney, (L. S. Parsons, Jr., United States Attorney, and Henry L. Hilzinger, Attorney, Interstate Commerce Commission, on brief) for Appellant, and Lewis Thomas Booker and Eppa Hunton, IV, (Hunton, Williams, Gay, Moore & Powell on brief) for Appellee.

[fol. 135] Opinion—Decided June 30, 1958

Haynsworth, Circuit Judge:

This is a proceeding under § 6 of the Safety Appliance Act (45 U.S.C.A. § 6) to collect the statutory penalties for violations of the Act. The violations are said to have occurred when, on four occasions, the railroad moved cars without coupling their brakes so that they could be operated by the engineer. It is admitted that, in each instance, the only operable brakes were those upon the engine, so the only issue is whether or not the movements were train movements within the contemplation of the Act (45 U.S.C.A. § 9) and the supplementary orders of the Commission.

In distinguishing between "train movements," in which the brakes of the cars must be coupled and operable, and switching movements, in which they need not be, courts have considered so many circumstances as affecting the character of the movement that we should first refer to the trackage and operations of the Seaboard in Hopewell, Virginia, where the movements occurred.

Hopewell, Virginia, is served by a branch line of the Seaboard which connects with the main line at Bellwood and terminates at Hopewell. Incoming trains from Bellwood arrive at a classification yard where they are broken up and from which the cars are distributed to consignees in Hopewell. Much of the distribution is effected over a lead track, which winds through the industrial section of Hopewell for a total distance of approximately two miles. Nine spurs, springing from the lead track, serve industrial customers whose plants are adjacent to them, and some of them are used for car storage. The spur, or customer lead, track most distant from the classification yard serves a plant of [fol. 136] Continental Can Co., while the one second in distance from the classification yard serves a plant of the Allied Chemical & Dye Co. A track for the interchange of traffic with the Norfolk and Western also springs from the lead track at a point approximately midway between the classification yard and the end of the lead at Continental Can Co.

The Norfolk and Western has lead tracks paralleling the Seaboard lead throughout most of the length of the latter, and several of the Norfolk and Western industrial spurs cross the Seaboard lead track. At such crossings, the Seaboard has the right of way, and Norfolk and Western crews must bring their engines to a complete stop before crossing the Seaboard lead track. The leads of both railroads cross several streets and private ways. The crossing of one of these streets, a state highway carrying a substantial amount of traffic, is protected by a watchman and manually operated gates. The crossings of other streets and ways are protected only by stationary signs.

There is no perceptible grade on the Seaboard lead, and all movements over it are at yard speeds and under yard control. It is a part of the Hopewell Yard, and serves no purpose other than the distribution of cars from inbound trains broken up in the classification yard and the assembly of cars to be made up, in the classification yard, into outbound trains.

When an incoming train has been broken up in the classification yard, a switch engine couples on to those cars which are to be delivered over the lead track. Acting under orders of the local freight agent, the switching crew proceeds to distribute the cars over the lead track. Those consigned to

[fol. 137] customers on Seaboard spurs are spotted on the appropriate spur, while those destined to points on the Norfolk and Western are placed upon the interchange track. Because of the specialized needs for different types of cars,[1] the crew may be required, enroute, to pick up cars from storage tracks and place them upon other spurs for loading. On the return trip,[2] the switching crews pick up from the spurs loaded outbound cars and empty cars for which the customer has no need, and, from the interchange track, cars which had been placed there by the Norfolk and Western for delivery to the Seaboard. These cars are then distributed to storage tracks breaking from the lead track or to the classification yard as circumstances may require. Outbound cars are then made up in the classification yard into an outbound train.

No question has been raised about any movement in either direction over the lead track during which the crew worked a spur relatively near the classification yard. It is asserted, however, that an isolated movement in either direction becomes a train movement if only the more distant spurs are worked. Thus, the charges here are based upon two movements from the classification yard to the Continental Can lead track without intermediate stops and upon two movements from the Allied Chemical lead track to the classification yard during at least one of which there was [fol. 138] an intermediate stop en route to pick up additional cars from the interchange track.[3]

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[1] Most of the material delivered to Allied Chemical & Dye, for instance, is in coal hopper cars and boxcars, but most of its product is shipped out in tank cars.

[2] It is possible that the operation in the two directions may overlap to some extent. If cars are to be delivered to a spur and other cars picked up from the same spur, it may be that both operations would be performed at the same time, but the record before us does not disclose the practice here.

[3] On one of the movements toward the classification yard, the engine left the Allied Chemical lead track with twenty nine loaded cars, stopped at the interchange track to pick up six loaded and fourteen empty cars and arrived at the classification yard with forty-nine cars. On the other ques

The fact that less than all of the nine spurs may be worked during a particular movement has no controlling significance. Nor do we believe the answer is to be found in an identification of the spurs actually worked. The nature of the work, its purpose and character are precisely the same, whether every other spur is to be worked, only those between the classification yard and the interchange track or only those, or one of them, between the interchange track and the end of the lead track. Whether these spurs are to be worked or those, the business of the switch engine and its crew here is the distribution of cars from trains which have completed their over-the-line run and the collection and assembly of cars to be made up into outgoing trains.

Nor do we accept the Government's contention that "since the defendant moved (cars) between designated points in its yard for a distance of about 2 miles without picking up or setting out any car enroute," the movement [fol. 139] must necessarily have been a train movement requiring operable train brakes. Substantially every switching operation involves such movements, many for comparable distances, but they take on the appearance of train movements only when lifted from their context of switching operations and separated from their function and purpose. It is not enough, ignoring what transpires before and what follows, to say that cars were moved from this point to that; the character of the operation is to be determined by a look at the whole and with due regard to all elements of its setting.

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tioned movement in that direction, records of the railroad indicate the engine left the Allied Chemical lead track with four loaded and one empty car, stopped at the interchange track to pick up one loaded and twenty empty cars and arrived at the classification yard with twenty-six cars, but an inspector for the Commission had testified that all twenty-six cars were moved from the Allied Chemical lead track without a stop at the interchange track.

The two movements from the classification yard to the Continental Can lead track were of twenty-eight and twenty-three cars, respectively. In each of these movements, some of the cars were ahead of the engine and others were behind it.

Thus viewed, we agree with the District Court that these movements were properly classified as switching movements. In the average day there were ten of such movements, and they do not fall into separate categories solely upon the basis of a classification, in terms of relative distance from the classification yard, of the spurs worked. The lead track, the spurs that break from it and the classification yard are all parts of one yard, and its extremities are not so distant as to deprive a movement from one end of the yard to the other of the flavor of its function in breaking up and making up trains.

Unlike other sections of the Safety Appliance Act which apply to the use or haulage of a locomotive or a car, the train brake provisions apply only to the running of trains. The difference in language is an appropriate expression of Congressional intention, in the adoption of the train brake provisions, to distinguish between an over-the-line run, during which the need of useful train brakes was great and obvious and compliance with the requirement would not unduly hinder railroad transportation, and switching operations, during which there is little or no need for train brakes and general and strict compliance with the requirement [fol. 140] would be impossible or highly impractical. The distinction was pointed out by the Supreme Court in the first case involving the train brake provisions to come before it. *United States* v. *Erie Railroad Company*, 237 U. S. 402, 35 S. Ct. 621, 59 L. Ed. 1019, and, a week later, the Supreme Court declared the controlling test to be "the essential nature of the work done." *United States* v. *Chicago, Burlington & Quincy Railroad Company*, 237 U. S. 410, 35 S. Ct. 634, 59 L. Ed. 1023.

But movements of trains and cars are so varied that the distinction between the fast, through train and the simplest switching operation is not always easily applied. Functionally, a transfer movement between separated yards may be a switching operation, but, particularly if it moves over main line tracks, it has elements of similarity to movements between major terminals and many of the underlying reasons for the train brake requirement are present. Train brakes are usually required in such movements. *United States* v. *Erie Railroad Company*, 237 U. S. 402, 35 S. Ct. 621, 59 L. Ed. 1019; *United States* v. *Chicago, Burlington*

& Quincy Railroad Company, 237 U. S. 410, 35 S. Ct. 634, 59 L. Ed. 1023; *Louisville and Jeffersonville Bridge Co. v. United States*, 249 U. S. 534, 39 S. Ct. 355, 63 L. Ed. 757; *United States v. Northern Pacific Railway Company*, 254 U. S. 251, 41 S. Ct. 101, 65 L. Ed. 249; *Chesapeake & O. Ry. Co. v. United States*, 4 Cir. 226 F. 683; *Illinois Central R. Co. v. United States*, 8 Cir., 14 F. 2d 747; *Chicago & E. R. Co. v. United States*, 7 Cir., 22 F. 2d 729; *United States v. Southern Pacific Co.*, 9 Cir., 60 F. 2d. 864; *United States v. Southern Pacific Co.*, 9 Cir., 100 F. 2d 984. Movements for the distribution and collection of cars have been held subject to the train brake provisions when conducted over main line tracks, *United States v. Panhandle & Sante Fe Ry. Co.*, 5 Cir., 203 F. 2d 241; *United States v. Thompson, Trustee*, [fol. 141] 8 Cir., 252 F. 2d 6, but similar movements over yard tracks have generally been held to be exempt switching operations. *United States v. Great Northern Ry. Co.*, 9 Cir., 73 F. 2d 736; *United States v. New York, C. & St. L. Ry. Co.*, 7 Cir., 77 F. 2d 215; *United States v. Elgin, J. & E. Ry. Co.*, 7 Cir., 182 F. 2d 1; *United States v. Chicago, Burlington & Quincy R. Co.*, 7 Cir., 199 F. 2d 223; *United States v. Pennsylvania Railroad Co.*, D. C., Md., 80 F. Supp. 965; *United States v. Great Northern Ry. Co.*, W. D., Wis., 103 F. Supp. 889; *United States v. Staten Island Rapid Transit Railway Company*, E. D., N. Y., 151 F. Supp. 911. Cf. *United States v. South Buffalo R. Co.*, 2 Cir., 168 F. 2d 948. Even though the movements with which he was concerned were over main line tracks, Judge Hutcheson, now Chief Judge of the Court of Appeals for the Fifth Circuit, held that the train brake requirements were inapplicable because of the short distances between the spurs to be worked. *United States v. Texas & N. O. R. Co.*, S. D., Texas, 13 F. 2d 429.

The movements here were not over main line tracks, nor even inter yard connecting tracks. They moved, entirely within the confines of one yard, over a lead track only two miles long from which there sprang nine spurs and an interchange track. Since the nature of the work was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make-up of others, we are convinced they were switching operations, exempt from the requirement of train brakes.

The classification of cars, narrowly considered, is but one of several exempt switching activities. Spotting cars upon

a team track alongside classification tracks is equally exempt. Delivering cars to spurs is no less typical of [fol. 142] switching than classification, and the considerations which exclude the one from the train brake requirement are applicable to the other. Movements over the lead track, from one spur requiring attention to the next, are an inseparable part of the switching activity, when the lead track is used, in fact, as an integral part of a yard in which the cars have been received or from which they are to be dispatched. Nor can we say, having due regard for the nature of the track, its connections and its use, that two miles is an unreasonable distance to travel without train brakes, when the "nature of the work done" is so clearly switching.

Much of the emphasis in the submission of the case has been upon the crossings of streets and of spurs of the Norfolk and Western, the Government pointing to them as potential hazards, while the railroad advances its safety record under the precautions of yard rules and asserts that the use of train brakes will increase, rather than minimize the risk of injury to trainmen, for they will be required to pass between the cars to couple the hose. Consideration of such crossings of streets and tracks is not irrelevant, for they are a part of the physical setting in which the movement must be viewed in order to determine its nature and character. A switching operation does not cease to be a switching operation, however, merely because the movement crosses a highway or spur track. Many an industrial spur crosses a public or private way, but spotting a car on such a spur does not become a line haul on that account. Movements over or across main line tracks may stand upon a different basis, where the switching movement becomes a potential hazard in the operation of main line trains, but crossing other yard tracks is a common incident in switching and their ownership by another railroad is not a significant circumstance.

[fol. 143] It is not contended here that the Act properly or rationally may be construed to require the use of train brakes on every switching movement which crosses streets or highways or the yard tracks of another railroad. On the contrary, it is conceded that movements over these same crossings are exempt from the requirement if shifting is

done relatively near the classification yard, a circumstance having no relation to the suggested hazard of the crossings. Whether or not a car has been placed upon a particular spur, the risk of collision with vehicular traffic at Randolph Street, and the other crossings, is precisely the same.

Where Congress has commanded the use of train brakes, the courts cannot excuse a failure to use them because of the use of other devices and measures, however effective in assuring safety they may be. If it were accepted that the Act should be construed to require train brakes whenever their use would contribute substantially to the safety of operations, an appraisal of the effectiveness of other measures would be necessary to decision, but it is not even contended that the Act has any such meaning.

Equally irrelevant, if Congress has required the use of air brakes, is consideration of the substantial cost to be imposed upon the railroad and of delay in the handling of freight. But if the use of train brakes on these movements is costly, delays shipments and creates new risks of injury without substantially contributing to the alleviation of existing risks, it is a reminder that courts should not extend the requirement beyond the intention of the Con-
[fols. 144-145] gress or needlessly chip away major portions of the long established exemption of switching operations.

Affirmed.

Separate opinion by Sobeloff, Circuit Judge, concurring in part and dissenting in part.

[fol. 146] In United States Court of Appeals for the Fourth Circuit

No. 7534

United States of America, Appellant,

versus

Seaboard Air Line Railroad Company, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

Argued March 6, 1958. Decided June 30, 1958

Opinion by Sobeloff, Circuit Judge, Concurring in Part and Dissenting in Part—Filed July 10, 1958

Before Sobeloff and Haynsworth, Circuit Judges, and Williams, District Judge

Edwin J. Slipek, Assistant United States Attorney (L. S. Parsons, Jr., United States Attorney, and Henry L. Hilzinger, Attorney, Interstate Commerce Commission, [fol. 147] on brief) for Appellant, and Lewis Thomas Booker and Eppa Hunton, IV, (Hunton, Williams, Gay, Moore & Powell on brief) for Appellee.

Sobeloff, Circuit Judge, concurring in part and dissenting in part:

After four and one-half years of operating its railroad cars between the Hopewell classification yard and the plants of the Continental Can Company and Allied Chemical & Dye Company in compliance with the airbrake provisions of the Safety Appliance Act (45 U.S.C.A., Sec. 9), the defendant, in March, 1956, ceased using airbrakes. I cannot agree that the change in practice was legally justified, and after consideration of the very persuasive majority opinion, I am nevertheless constrained to dissent from the holding that none of the four movements in question constitutes a "train" movement within the meaning of the Act. As to three of them at least, those in which there was no

picking up or shunting of cars en route,[1] the Act seems clearly applicable.

The facts of the case have been painstakingly stated and, with few exceptions, require no amplification. These exceptions are, however, crucial. It should be mentioned as more than coincidence that three of the four movements were accomplished without stops en route. The defendant's own evidence is that Seaboard's agent at Hopewell, Mr. [fol. 148] Morrison, customarily receives lists from the various industrial plants along the line, informing him of the cars to be picked up by Seaboard. The "yard people" are then issued instructions as to the cars to be moved to and from the plants. Therefore, as to the first movement in question (count number 1), when Seaboard's crew coupled together an engine and 26 cars at the Allied Chemical and Dye Company plant on March 5, 1956, it was known to them that they would proceed, non-stop, for a distance of two miles, and, in the second movement on that day (count number 2) and the one in question which occurred the next day (count number 4), 28 and 23 cars, respectively, were assembled for uninterrupted two-mile runs from the Hopewell classification yard to the Allied Chemical and Dye Company and the Continental Can Company's plants. Except for their role in the topographical setting, therefore, the presence of a number of other closely-spaced industrial spurs which may, at different times, be worked is irrelevant to this case. The fact that, on other occasions, frequent stopping and shifting of cars might make the process of coupling and uncoupling airbrakes utterly impractical, is equally unimportant so far as the movements here involved are concerned. This feature of the case should not be ignored.

The question, then, is whether a train, to be subject to the Act, may consist of a locomotive and 23 or more cars which have been either assembled from incoming trains or picked up at one location, and which are to proceed, non-stop, for a distance of approximately two miles, where, at

[1] Although there was a conflict in the evidence whether one or two of the movements were interrupted by switching operations en route, the District Judge resolved the conflict by finding a stop for switching in only one of the four, the one alleged as the third violation.

their destination, they are either unloaded or reassembled into outgoing trains.

In terms, the Act requires airbrakes to be used on "all trains . . . used on any railroad." As my colleagues have [fol. 149] observed, however, the Supreme Court, in a series of four cases, drew a distinction between "train" and "switching" operations, ruling that the airbrake requirement was inapplicable to the latter, and declaring the test to be "the essential nature of the work done."

The character and extent of the "switching" exemption, and the relative weight due the various criteria in the application of the "essential nature" test, can best be ascertained by examining and appraising the various contexts in which they were judicially created and authoritatively applied. Resort to the Supreme Court cases, in some detail, becomes necessary.

The first was *United States* v. *Erie R. R.*, 237 U.S. 402, decided by a unanimous Court in 1915. The defendant railroad operated a freight yard at Bergen, New Jersey, where regular eastbound freight trains were stopped and broken up and regular westbound freight trains made up and started. Following the break-up of the eastbound trains, and before the assembly of westbound trains, temporary groupings of cars, known as "transfer trains," were made up and moved to and from two other freight yards. The first, the Jersey City yard, was located two miles from Bergen, and the other, the Weehawken yard, three and one-half miles from Bergen. The trains ran only between these yards, usually had about twenty-five cars, carried no caboose, were operated by crews and engines specially engaged in that service, and at irregular intervals under the orders of yardmasters, at speeds of seven to eighteen miles per hour. Without using the requisite number of airbrakes, nine transfer trains were hauled from Jersey City to Bergen, six from Bergen to Weehawken, two from Weehawken to Bergen, and one from Bergen to Jersey City. These operations, similar to the ones in question here, were held to be [fol. 150] train operations within the meaning of the Safety Appliance Act.

It is, of course, arguable that a distinction exists between the work done in *Erie* and the instant case, in that the cars here were being hauled to and from their ultimate con-

signees, whereas in the *Erie* case, the cars received by the Jersey City and Weehawken yards were then to be delivered further to their industrial and commercial consignees. Such a distinction, if suggested, would not be a valid one, and the *Erie* opinion itself refutes it. In summing up the decision in *Erie*, the Court, through Mr. Justice Van Devanter, said: "We, therefore, conclude and hold that it [the airbrake provision of the Safety Appliance Act] embraced these transfer trains. Its applicability to this class of trains was considered and sustained in . . . *United States* v. *Pere Marquette Railroad*, 211 Fed. Rep. 220 [D. Ct. W. D. Mich., 1913]. . . ." The approval and adoption by the Supreme Court of the decision in *Pere Marquette* is significant, because the District Court held in that case that the transfer of a string of 17 cars, assembled from incoming trains which had been broken up, for a distance of two miles within the general yard limits of the City of Grand Rapids, the cars to be unloaded at their destination, constituted a "train" movement within the meaning of the Safety Appliance Act. Thus, as early as the *Erie* case, it was decided that a "transfer train" may consist of a string of cars hauled a short distance for unloading as well as further forwarding.

A week after its decision in *Erie*, the Supreme Court rendered its decision in the second of the pertinent cases, *United States* v. *Chi., Burl. & Q. R. R.*, 237 U.S. 410 (1915). Again dealing with transfer trains hauled for a short distance (2 miles), this time around Kansas City, Missouri, [fol. 151] the Court concludes that the trains in question were "exposed to the hazards" which the airbrake provision "was intended to avoid or minimize," and the movements were held to be train movements. P. 412. The railroad argued that the work of moving the transfer trains was being done by switching crews, and in answer to this contention, the Court formulated what has become known as the "essential nature" test: "Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied against it." P. 413.

In the third of the Supreme Court decisions, *Louisville &c. Bridge Co.* v. *United States*, 249 U.S. 534 (1918), moving, for a distance of three-quarters of a mile, a string of

26 cars which had been assembled for delivery to another railroad, was held to be a train movement. Mr. Justice Clarke, writing for the Court, stated: "An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a 'train' of cars, but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute." P. 538. Discounting the argument that the work done was merely part of a switching operation, Justice Clarke pointed out that the features considered generally as constituting exempt switching movements, were not present: "The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single [fol. 152] car, and it cannot, therefore, with propriety be called a switching movement." P. 538.

Finally, in *United States* v. *Northern Pac. Ry. Co.*, 254 U.S. 251 (1920), the Supreme Court was presented with a fact situation almost identical to the one in question here, and again without dissent, the Court held that the movements involved constituted train movements. The history of the *Northern Pac.* case is interesting for two reasons. First, the facts are more fully developed in the Court of Appeals opinion and, second, the Court of Appeals, which was reversed, took the same approach to the case as have my colleagues here.

South of the main tracks at Duluth, Minnesota, were several tracks known as the "Duluth Terminal" or "D. T. Tracks." They were operated as a single yard, and no part of them was ever used by any trains running between stations, freight or passenger, but, as in our case, they were used "exclusively . . . to supply the industries along these tracks with loaded cars or empties to be loaded for outgoing freight, for delivery to the main line." 244 F. 655, 657, 658. The trains were not operated according to fixed schedules, but were moved under the yardmaster's orders at such speeds that they could be stopped at vision. Two strings of freight cars, consisting of 40 and 48 cars, respec-

tively, were run along this line for a distance of approximately 4 miles at speeds varying between three and eighteen m.p.h. The Court of Appeals for the Eighth Circuit thought the earlier Supreme Court cases distinguishable in that the movements involved in those cases were along main line tracks and not devoted exclusively to the servicing of local industries. Affirming a directed verdict for the defendant railroad, the Eighth Circuit held: "From these facts no other conclusion can be reached than that of the learned [fol. 153] trial judge, that these train movements were mere switching operations, and therefore not within the airbrake provision of the Act of Congress, as determined in the Erie and Chicago, Burlington & Quincy Railroad cases, supra." 255 F. 655, 658.

The Supreme Court, in an opinion by Justice Brandeis, disagreed. It held that the movements along the D. T. Tracks in the Duluth area were movements of transfer trains within the doctrine of the three prior cases, and were not switching operations exempt from the Act. The Supreme Court found it "material" that the tracks crossed two streets at grade; five tracks of other railroads, one of which carried passenger trains; and that, for a distance of about one mile, two other railroad companies, "under the usual traffic-right agreements," also used the D. T. Tracks for delivering cars to consignees. Although, at two intermediate points along the D. T. Tracks there were 9 and 6 tracks, respectively, where cars were frequently set out or picked up by the transfer trains, the Court noted that the two movements in question were accomplished without stops. The fact that on other occasions the locality was used for switching operations was not permitted to outweigh the fact that at the times under inquiry, no stops were made to switch cars. In our case, not only were there no such stops but, as before mentioned, three of the runs were begun with the fore-knowledge that no stopping or switching would be required.

In answer to the argument that the trains were not operated on a main line, Justice Brandeis stated that if use of a main line were essential, the requirement would be satisfied by the presence of other freight trains, quoting the language of Justice Van Devanter in the *Chi., Burl. & Q. R. R.* case that the defendant's trains and those of other

[fol. 154] railroads "which the statute was equally designed to protect," "were exposed to the hazards which that provision was intended to avoid or minimize." 254 U.S. 254. "But," continued Justice Brandeis, "there is nothing in the Act which limits the application of the provision here in question to operations on main line tracks." Thus he made it plain that even if there had been no other trains using the tracks, the legal result would have been the same.

The inescapable rationale of the four Supreme Court cases, as developed and refined in the *Northern Pacific Ry. Co.* case, is that transfer movements, even of the nature shown here (to and from industrial and commercial consignees), and even on tracks specially used for that purpose, are train movements subject to the airbrake provisions of the Act if they are not accompanied by the picking up and delivery of cars en route (which would necessitate the frequent coupling and uncoupling of air hoses), and if there is an exposure to the hazards which the Act was designed to avoid or minimize.

Our inquiry should then turn to discover the purposes of the Act and to examine whether the existing factual circumstances involve the dangers sought to be avoided.

In *Louisville &c. Bridge Co.*, Justice Clarke stated that it is the purpose of the Act to secure the "safety of employees, of passengers and of the public. . . ." 249 U.S. 534, 538. In distinguishing between "passengers" and "the public," the Court made it clear that, as interpreted by them, the Act was designed to extend protection to more than employees and users of railroads. Viewing the general public as direct and not incidental beneficiaries of the Act's provisions, the topographical setting of the Hopewell area, especially the presence of intersecting streets and railroads, [fol. 155] comes into focus as an essential element in determining the issue whether the activities involved are "train movements."

Passing to the details of the territory through which the questioned movements were made, it should first be noted that a number of tracks of the Norfolk and Western Railway cross those of Seaboard at grade, and the Norfolk and Western, which also maintains tracks similar to Seaboard's here and which parallel Seaboard's, uses the intersecting tracks to make deliveries of cars to the various in-

dustries along the route. Moreover, according to the testimony of Mr. Roy E. Kean, Seaboard's assistant superintendent at Richmond, engines of the Norfolk and Western Railway and the Allied Chemical and Dye Company, as well as those of the defendant, operate over the defendant's tracks in the vicinity of Allied Chemical and Dye for a short distance.

In addition to private road crossings, five public streets intersect the defendant's tracks. One, known as DuPont Street, is the means of access to Allied's plant. Another, Terminal Street, is the situs of the headquarters and main fire station of the Hopewell Fire Department, which also houses automotive equipment of the Hopewell Emergency Squad. The evidence showed that vehicles of the Fire Department have occasion to use the Terminal Street intersection, although there was no direct evidence of there having been interference, by the defendant, with the passing of their vehicles. Randolph Street, also known as Virginia State Route 10, is the main automobile route between Richmond and Norfolk. It is a "heavily travelled" road, and at the point where it crosses the Seaboard tracks, there is a sharp curve which materially restricts visibility of railroad cars approaching the crossing from either direction. While it is true that the crossing is protected by manually oper-[fol. 156] ated gates, the Supreme Court in *Louisville &c. Bridge Co.* declared that the very presence of gates at street crossings "serve[s] to emphasize the dangerous character of the movement." 249 U.S. 534, 539.

Palm Street and Hopewell Street also cross the Seaboard tracks, and the latter leads to the Hercules Powder Company plant, described in the testimony as a "relatively large plant." These two intersections have been the scenes of four collisions with automobiles since 1941, and three of them involved trains not having their airbrakes in operation.

Although the Randolph Street intersection is the only one protected with more than stationary signs, as the District Judge found, traffic over the street crossings varies from moderate to heavy. The moderate traffic, which occurs at hours coinciding with the usual hours of the defendant's movements along the tracks, is by no means insubstantial.

The evidence, moreover, shows that Seaboard frequently operates its trains with a number of cars in front of the locomotive as well as behind it, thereby increasing the danger. Two of the movements in question here (counts 2 and 4) were made with 13 and 8 cars, respectively, ahead of the engine. Because the engineer's range of vision is consequently reduced, there is, in these situations, still more reason for requiring the use of airbrakes. J. R. Hoag, a retired I.C.C. inspector, who is employed by Seaboard as Safety Consultant, was sent to Hopewell to survey the area and, in a letter to Seaboard's General Superintendent, he wrote, "... in cases where any considerable number of cars, probably more than ten, are pushed ahead of the engine, then the air brakes should be coupled on those cars and a [fol. 157] tail hose provided so the trainman on the leading car can control the movement in case of emergency." He also advised that "there is no question that where air brakes are coupled and in use on a cut of cars, quicker stops can be made from any speeds."

Since it appears that an important factor in the essential nature of the work done is the potential hazard to those whom the Act is designed to protect, and since the Act has been construed as having been designed to include the general public in its protection, the sum of the elements in this case makes it more than evident that Seaboard has violated the Safety Appliance Act as to at least three of the movements in question.

The majority opinion relies on several cases which, under facts similar to those before us, held the movements only switching operations, exempt from the requirements of the Act. Notable are three cases from the Seventh Circuit. In the first of these, *United States* v. *New York, C. & St. L. Ry. Co.*, 77 F.2d 215 (1935), the Court cited *Louisville &c. Bridge Co.* v. *United States*, 249 U.S. 534 (1919), as the closest Supreme Court case, and distinguished it on its facts. The *Northern Pacific* case, 254 U.S. 251, which is indistinguishable, was apparently overlooked. Fifteen years later, however, when *United States* v. *Elgin S. & E. Ry. Co.*, 182 F.2d 1 (1950), was before that Court, *Northern Pacific* was cited to it, and the Seventh Circuit distinguished it on the basis of there having been two street crossings and five rail crossings at grade in *Northern Pacific*, whereas in

Elgin, no public streets or other railroads were crossed at grade, only two private roadways. The third case, *United States* v. *Chicago, B. & Q. R. Co.*, 199 F.2d 223 (1952), was decided two years after *Elgin*. Although in *Chicago, B. & Q.* one of the questioned movements was a two-mile [fols. 158-159] straight road which crossed two public streets at grade, and rode over a track used by two through trains passing between Eola and West Chicago, the Court nevertheless followed its decision in *Elgin* and held that it was only a switching movement. Again the indisputably contrary *Northern Pacific* case went undistinguished and unmentioned.

There is no need to labor over decisions irreconcilable with those of the Supreme Court, for it is our duty to follow the law as laid down by that body, and not the contrary holdings of other courts.

The Second Circuit, on the other hand, in *United States* v. *South Buffalo R. Co.*, 168 F.2d 948 (1948), held that the crossings of a private way in movements similar to those here was a sufficient element to render the movements those of "trains" within the meaning of the Act. Judge Augustus Hand, speaking for the Court, declared: "We think it undesirable for the courts by their decisions to enable railroads to eliminate safety appliances where hazards undoubtedly exist to some substantial degree and where the use of such appliance would insure increased protection." 168 F.2d 948, 952. The Second Circuit is, I think, in harmony with controlling authority.

I would affirm as to count 3, and reverse as to counts 1, 2 and 4.

[fol. 160] In United States Court of Appeals for the Fourth Circuit

No. 7534

United States of America, Appellant

vs.

Seaboard Air Line Railroad Company, Appellee

Judgment—Entered June 30, 1958

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 30, 1958.

Clement F. Haynsworth, Jr., United States Circuit Judge.

August 18, 1958, mandate issued and transmitted to Clerk of the United States District Court at Richmond, Virginia.

[fols. 161-162] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1958

No. —

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 23, 1958

Upon Consideration of the application of counsel for petitioner.

It Is Ordered that the time for filing petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including November 28th, 1958.

Earl Warren, Chief Justice of the United States.

Dated this 23rd day of September, 1958.

[fols. 163-164] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1958

No. 540

UNITED STATES OF AMERICA, Petitioner,

vs.

SEABOARD AIR LINE RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—January 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurther took no part in the consideration or decision of this application.

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